No. 92-344-CFX
Status: GRANTED

Title: Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al., Petitioners
v.
Haitian Centers Council, Inc., et al.

Docketed:
August 24, 1992

Court: United States Court of Appeals for the Second Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Koh,Harold Hongju, Tringali,Joseph F., Ratner,Michael, Schoenholtz,Andrew I., Helton,Arthur

Entry	Date	Note	Proceedings and Orders
43	Jan 21 1992	X	Reply brief of petitioners (TO BE PRINTED) filed.
1	Jul 30 1992	G	Application (A92-82) for a stay of judgment of U.S. Court of Appeals for the Second Circuit and stay of order of USDC for ED NY pending cert., submitted to Justice Thomas.
2	Jul 30 1992		Application (A92-82) referred to the Court by Justice Thomas.
3	Jul 30 1992		Response to application (A92-82) requested by Justice, due July 31, 1992.
4	Jul 31 1992		Response to application (A92-82) filed by Haitian Centers Council, Inc., et al. (Exhibits Vol. 1 & 2).
5	Jul 31 1992		(A92-82) Reply to opposition for stay filed by Solicitor General.
6	Aug 1 1992		Application (A92-82) granted by the Court.
7	Aug 3 1992		(A92-82) Respondents' motion to treat the application for stay as a petition for writ of certiorari filed.
8	Aug 5 1992		(A92-82) Respondents motion DENIED.
9	Aug 24 1992	G	Petition for writ of certiorari filed.
10	Aug 24 1992		Appendix of petitioner Immigration and Naturalization Service filed.
11	Sep 9 1992		DISTRIBUTED. September 28, 1992
12	Sep 9 1992	X	Brief of respondents Haitian Centers Council, Inc., et al. in opposition filed.
13	Sep 18 1992	X	Reply brief of petitioner Immigration and Naturalization Service filed.
14	Oct 5 1992		Petition GRANTED.
			**********
15	Nov 3 1992		Record filed.
		*	Partial proceedings United States Court of Appeals for the Second Circuit (BOX)
16	Nov 6 1992	P	Application (A92-376) by Petitioner to file a brief on the merits in excess of page limits, submitted to Justice Thomas.
17	Nov 9 1992		(A92-376) Application granted by Justice Thomas. Brief on the merits should not exceed 60 pages.
18	Nov 12 1992		Brief of petitioners Gene McNary, Commissioner filed.
19	Nov 17 1992	D	Motion of respondents to suspend briefing filed.
20	Nov 18 1992		Brief amicus curiae of Federation for American Immigration Reform filed.
21	Nov 30 1992		Motion of respondents to suspend briefing DENIED.

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No. 92-344-CFX

Entry	Date	Note	Proceedings and Orders
			Justice Blackmun and Justice Souter would grant this motion.
23	Dec 4 1992		Order extending time to file brief of respondent on the merits until December 21, 1992.
24	Dec 8 1992	P	Application (A92-458) by respondent to file a respondents' brief in excess of page limits, submitted to Justice Thomas.
25	Dec 9 1992		(A92-458) Application GRANTED. Brief should not exceed 65 pages.
26	Dec 21 1992		Brief amicus curiae of Lawyers Committee for Human Rights filed.
27	Dec 21 1992		Brief amici curiae of National Assn.for the Advancement of Colored People, et al. filed.
28	Dec 21 1992		Brief amicus curiae of International Human Rights Law Group filed.
29	Dec 21 1992		Brief amici curiae of American Immigration Lawyers Assn., et al. filed.
30	Dec 21 1992		Brief amicus curiae of Nicholas DeB. Katzenbach,et al. filed.
31	Dec 21 1992		Brief amicus curiae of Human Rights Watch filed.
32	Dec 21 1992		Brief of Office of the United Nations High Commisisoner for Refugees filed.
33	Dec 21 1992		Brief amicus curiae of American Jewish Committee and Anti-Defamation League filed.
34	Dec 21 1992		Brief amicus curiae of Assn.of the Bar of City of New York filed.
35	Dec 21 1992		Brief amicus curiae of Amnesty International and Amnesty International-USA filed.
36	Dec 21 1992		Brief amici curiae of Haitian Service Organizations, et al. filed.
38	Dec 21 1992		Brief of respondents Haitian Centers Council, et al. filed.
39	Dec 21 1992		Brief amici curiae of Edward M. Kennedy and members of Congress filed.
37	Dec 28 1992		SET FOR ARGUMENT TUESDAY, MARCH 2, 1993. (1ST CASE).
40	Jan 7 1993		CIRCULATED.
41	Jan 8 1993	X	Joint appendix filed.
42	Jan 19 1993	P	Application (A92-552) by Solicitor General to file a reply brief on the merits in excess of page limits, submitted to Justice Thomas.
44	Jan 21 1993		(A92-552) Application GRANTED. Reply brief may not exceed 30 pages.
45	Jan 21 1993	X	Reply brief of petitioners filed.
46	Mar 2 1993		ARGUED.
47	Mar 3 1993		Letter from Counsel for the respondents received and distributed.

92-344

No.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals properly ordered the district court to enter a preliminary injunction barring implementation of Executive Order No. 12,807, which was issued by the President on May 24, 1992, to authorize repatriation directly to Haiti of Haitian migrants interdicted by the United States Coast Guard on the high seas.

PARTIES TO THE PROCEEDINGS

The petitioners are Lawrence Eagleburger, the Acting Secretary of State (substituted as a party pursuant to Rule 35.3); William P. Barr, the Attorney General; Gene McNary, the Commissioner of the Immigration and Naturalization Service; Rear Admiral Robert Kramek and Admiral J. William Kime, United States Coast Guard; and the Commander of the United States Naval Base at Guantanamo Bay, Cuba.

The respondents are the Haitian Centers Council, Inc.; the National Coalition for Haitian Refugees, Inc.; the Immigration Law Clinic of the Jerome N. Frank Legal Services Organization of New Haven, Connecticut; and the following individual Haitian nationals: Dr. Frantz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, Roges Noel, A. Iris Vilnor, Mireille Berger, Yvrose Pierre and Mathieu Noel. The individual respondents brought this action on behalf of others similarly situated with respect to the high-seas interdiction program, including subclasses consisting of certain Haitian migrants who had been "screened in" or "screened out" or were awaiting screening under that program; relatives of such individuals; and Haitian migrants who had retained one of the respondent organizations to represent them. Compl. ¶¶ 36-41 (92-6090 C.A. App. 25-26).

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No.

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Commissioner of the Immigration and Naturalization Service, *et al.*, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion under review here (App. 1a-72a)[1] and its prior opinion (App. 73a-124a) are not yet reported. The district court's opinions (App. 125a-141a, 142a-163a, 164a-168a, 169a-170a) are not reported. The Eleventh Circuit's opinions in *Haitian Refugee Center* v. *Baker* (App. 171a-190a, 191a-252a) are reported at 949 F.2d 1109 and 953 F.2d 1498, respectively.

[1] "App." refers to the separately bound appendix to this petition for a writ of certiorari. "Stay App." refers to the appendix to the emergency application for a stay pending certiorari that we filed in this Court on July 30, 1992.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

TREATY, STATUTES AND EXECUTIVE ORDERS INVOLVED

Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; 5 U.S.C. 701(a); Section 243 of the Immigration and Nationality Act, 8 U.S.C. 1253; and Executive Orders Nos. 12,807 and 12,324 are reproduced at App. 253a-265a.

STATEMENT

The sharply divided court of appeals in this case entered an extraordinary order barring implementation of Executive Order 12,807, which the President issued on May 24, 1992, to address the rapidly escalating crisis resulting from the massive outflow of migrants from Haiti in small, unseaworthy boats. The Executive Order authorizes the Coast Guard to repatriate directly to Haiti all migrants interdicted and rescued while headed toward the United States on the high seas. Once in Haiti, the interdictees—like any other Haitians claiming to be refugees—may apply at the United States Embassy in Port-au-Prince for admission to the United States under Section 207 of the Immigration and Nationality Act (INA), 8 U.S.C. 1157. The court of appeals, however, has attempted to reverse that policy. It did so based on an erroneous interpretation of a provision of the INA (8 U.S.C. 1253(h)) that—properly construed—has no application to aliens outside the United States. In the process, the court brushed aside the collateral estoppel effect of the Eleventh Circuit's decision rejecting the same claim on behalf of a class that includes the Haitian plaintiffs here; second-guessed the President's determination of the most appropriate manner in which to address the migrant

problem within the context of the broader crisis affecting Haiti; enjoined the operation of U.S. vessels on the high seas under the President's command; and intruded into a delicate area of the Nation's foreign policy. Its decision should not be permitted to stand.

1. This case arises out of the President's exercise of his constitutional and statutory authority to establish a program for interdicting would-be illegal migrants on the high seas. See 8 U.S.C. 1182(f), 1185(a); 14 U.S.C. 89. The program was instituted in 1981, based on a determination by the President that uncontrolled illegal immigration by sea is a "serious national problem." Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981). The President, in Executive Order No. 12,324, directed the Coast Guard to intercept vessels suspected of transporting illegal migrants and to return all passengers to their country of origin, subject to a proviso that any "person who is a refugee" would not be repatriated without his consent. § 2(c)(3), 46 Fed. Reg. 48,109 (1981). Contemporaneously, the United States entered into a bilateral agreement with Haiti that permitted U.S. officials to interdict and board Haitian flag vessels suspected of carrying illegal migrants. Agreement Effected by Exchange of Notes, U.S.-Republic of Haiti, Sept. 23, 1981, 33 U.S.T. 3559, T.I.A.S. No. 10,241.

To implement Executive Order No. 12,324, the Immigration and Naturalization Service (INS) conducted informal, non-adversarial "screening" interviews of interdictees on board Coast Guard cutters. Any interdictees who made a credible showing of political refugee status were tentatively "screened in" and brought to the United States, where they could file a formal application for political asylum under 8 U.S.C. 1158. Interdictees unable to make such a showing were "screened out" and returned immediately to Haiti. App. 75a-76a, 193a-197a.

The interdiction program has been an effective tool in the enforcement of our immigration laws. Between 1981

and 1991, more than 25,000 would-be illegal migrants were interdicted. Since October 1991, an additional 35,000 individuals have been interdicted. Leahy Decl. ¶¶ 3, 4 and attachments (Stay App. 338-339, 342, 345, 346). The interdiction program has also saved countless lives, as many of the boats could not have completed the long voyage to the United States.

2. a. The present crisis began with a military coup in Haiti on September 30, 1991, in which the democratically elected government of President Jean-Bertrand Aristide was overthrown. Although the United States temporarily halted repatriation of interdicted Haitians following the coup, it resumed repatriations on November 18, 1991, when the immediate post-coup violence subsided. App. 76a, 144a, 197a.

b. On November 19, 1991, Haitian Refugee Center, Inc. (HRC), and others filed an action (*HRC* v. *Baker*) in the United States District Court for the Southern District of Florida. They contended, *inter alia*, that the repatriations violated 8 U.S.C. 1253(h), which provides that the Attorney General shall not deport or return an alien to a country if the Attorney General determines that the alien's life or freedom would be threatened on account of political opinion. On the day the complaint was filed, the district court entered a temporary restraining order barring repatriation of any interdictees. Stay App. 114-116. Because interdictions were continuing at a high rate and Coast Guard vessels were seriously overcrowded, U.S. officials decided to house interdictees temporarily at the U.S. Naval Base at Guantanamo Bay, Cuba. Cummings Decl. ¶ 11 (Stay App. 122-123).

The district court in *HRC* subsequently certified a plaintiff class consisting of (App. 7a):

> all Haitian aliens who are currently detained or who will in the future be detained on U.S. Coast Guard cutters or at Guantanamo Naval Base who were interdicted on the high seas pursuant to the United States Interdiction Program and who are being denied First Amendment and procedural rights.

On December 3, 1991, the court then entered a preliminary injunction that continued the prohibition against repatriations. The court relied on what it found to be a First Amendment right of plaintiff HRC to have access to the interdictees, and on Article 33.1 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, which provides that a Contracting State shall not "expel or return ('refouler')" a refugee to a country where his life or freedom would be threatened on account of political opinion.[2] Stay App. 168-230. At the same time, the court rejected the claim by the class of present and future interdictees under 8 U.S.C. 1253(h), explaining that "the statutory rights and protections asserted are reserved, by the very terms of the statute[], to aliens within the United States." Stay App. 219-220. The Eleventh Circuit reversed the preliminary injunction, App. 171a-189a (*HRC I*), but the district court immediately entered several further injunctions on other grounds. See App. 199a-202a.

In late January 1992, the government sought emergency relief from the Eleventh Circuit, supported by evidence that the bar to repatriations was exacerbating the situation by providing an incentive for Haitians to take to the seas. When the Eleventh Circuit failed to act promptly on that request, the government filed an application for a stay in this Court, citing the same exigencies. This Court granted a stay the next day, pending the Eleventh Circuit's decision on the government's appeals, and thus permitted repatriations to resume. 112 S. Ct. 1072 (Jan. 31, 1992). A few days later, the Eleventh Circuit rendered its decision, reversing the remaining injunctions and ordering dismissal of the action. App. 190a-

[2] The United States acceded to Article 33.1 of the Convention by ratifying the United Nations Protocol Relating to the Status of Refugees, Jan. 11, 1967, 19 U.S.T. 6223.

252a (*HRC II*). The court expressly rejected the Haitian plaintiffs' claim under 8 U.S.C. 1253(h), explaining that Section 1253(h) "is found in Part V of the INA" and that "[t]he [relevant] provisions of Part V * * * only apply to aliens 'in the United States.'" App. 215a (quoting 8 U.S.C. 1251, 1253(a)). This Court denied the *HRC* plaintiffs' application for a stay and petition for a writ of certiorari on February 24, 1992. 112 S. Ct. 1245.

3. Just a little more than three weeks later, respondents filed this suit in the United States District Court for the Eastern District of New York, raising essentially the same challenges to the interdiction program that had been rejected in *HRC*. On April 6, the district court, relying on the First Amendment and the Due Process Clause, entered a preliminary injunction that (i) required petitioners to grant the respondent organizations "access" to the individual interdictees housed at Guantanamo, and (ii) enjoined petitioners from reinterviewing or repatriating interdictees who previously had been "screened in," without first allowing them to communicate with counsel. App. 142-163a; see also *id.* at 125a-141a (prior temporary restraining order.)[3] The court certified a class of "Screened in Plaintiffs" entitled to that relief. *Id.* at 161a-162a. After unsuccessfully seeking a stay in the court of appeals, the government sought

[3] The government had continued the practice of paroling into the United States under 8 U.S.C. 1182(d)(5) most Haitian migrants who made a sufficient threshold showing to be screened in, although there was some delay in doing so because of the need to find sponsors for them in the United States. The INS decided, however, to reinterview at Guantanamo those screened-in migrants who had tested positive for the HIV virus. Such aliens are excluded from admission unless the Attorney General grants a waiver. See 8 U.S.C. 1157(c)(3), 1182(a)(2)(A)(i). The thought was that persons statutorily ineligible for entry should not be brought to the United States in the absence of a determination that they are genuine refugees. App. 82a-83a, 147a; Cummings Decl. ¶¶ 21-24 (Stay App. 127).

relief in this Court, which granted a stay on April 22, 1992. 112 S. Ct. 1714.

On June 10, 1992, the court of appeals vacated those portions of the preliminary injunction that required the government to grant the respondent organizations access to Guantanamo, but affirmed the prohibition against further processing or repatriation of "screened in" interdictees without affording them an opportunity to communicate with counsel. App. 73a-118a. Because the court of appeals' decision directly affected only the several hundred screened-in Haitians remaining at Guantanamo who had communicable diseases (see note 3, *supra*) and did not require the government immediately to grant access to counsel, the government did not seek extraordinary relief in this Court.[4]

4. In May 1992, while the appeal of the preliminary injunction was still pending before the Second Circuit, the number of individuals leaving Haiti by boat surged dramatically; nearly 10,500 Haitians were intercepted by the Coast Guard in the first 20 days of the month, exceeding the total for the prior three months combined. By May 20, the temporary tent camp at Guantanamo was nearing capacity. Leahy Decl. ¶¶ 5-6 (Stay App. 339-340); Allen Decl. ¶¶ 2-3 (Stay App. 348-349). For that reason, and to avoid dangerous overloading of its cutters, the Coast Guard issued orders to interdict only boats in imminent danger of foundering. But the migration continued, in vessels unseaworthy, overloaded, and unfit for the intended voyage. About that time, a Haitian vessel capsized off the Cuban coast, resulting in the death of approximately half the forty migrants aboard. Leahy Decl. ¶¶ 6-7 (Stay App. 339-340). In addition, the State Department believed that a massive outmigration would make the United States "vulnerable to pressure tactics from the de facto authorities in Haiti * * * to abandon

[4] The government's petition for rehearing and suggestion of rehearing en banc were denied on July 24, 1992.

the embargo and other measures designed to speed the return of democracy." Kanter Decl. ¶ 4 (Stay App. 353).

At this juncture, the President had limited options. In light of the saturation of Guantanamo and the Coast Guard cutters, the unwillingness of third countries to accept any significant numbers of Haitian migrants, and the continuing massive outflow and attendant risk of loss of life, the only practicable alternatives were either to bring all Haitian migrants directly to the United States for screening or repatriate them all to Haiti immediately upon interdiction. Based on the judgment that the former course would precipitate a further outflow of a magnitude as yet unknown (with an even greater prospect of chaos and loss of life), the President decided to continue the interdiction program but to repatriate all interdictees directly to Haiti, and to provide for processing of applications for refugee admission to the United States at our Embassy in Port-au-Prince, pursuant to 8 U.S.C. 1157. Kanter Decl. ¶¶ 8, 10-11 (Stay App. 354-355). This decision was embodied in Executive Order No. 12,807, 57 Fed. Reg. 23,133 (1992), issued May 24, 1992, which replaced Executive Order No. 12,324.[5] At the same time, the President took steps to assure adequate staff at our Embassy in Haiti to process refugee applications,[6] or-

[5] Although the May 24 Executive Order does not require screening of migrants interdicted on the high seas, it provides that "the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent." § 2(c)(3), 57 Fed. Reg. 23,134. Under Coast Guard instructions, an interdictee will not be repatriated immediately to Haiti if the commanding officer believes that repatriation would place the interdictee in immediate and exceptionally grave physical danger, based on either the officer's observation or compelling statements by the individual. In that situation, the commanding officer is to provide temporary refuge and seek direction from higher authority. Leahy Decl. ¶ 12 (Stay App. 341-342).

[6] The State Department has informed us that it currently has at least 10 U.S. officials and 25 Haitian employees engaged in receipt and processing of applications at the U.S. Embassy, and that it has received applications on behalf of more than 9000 persons since the initiation of in-country processing earlier this year.

dered an immediate increase in humanitarian aid for the people of Haiti, and called on the international community to furnish additional assistance. 28 Weekly Comp. Pres. Doc. 924 (May 24, 1992).

5. On May 27, 1992, respondents applied for a temporary restraining order to bar implementation of the President's May 24 Executive Order. Treating the application as a motion for a preliminary injunction, the district court denied relief. App. 164a-168a. It held, *inter alia*, that "Section [1253(h)] is * * * unavailable as a source of relief for Haitian aliens in international waters." App. 167a-168a.

6. Two months later, a divided panel of the court of appeals reversed and ordered entry of a preliminary injunction, albeit without addressing the government's argument that judicial review under the APA is precluded because the INA provides for review only at the behest of aliens within the United States. App. 1a-72a.

a. The majority first held that the Haitian plaintiffs' claim under 8 U.S.C. 1253(h) is not barred under collateral estoppel principles by the Eleventh Circuit's decision in *HRC II*, which squarely held that Section 1253(h) does not apply to aliens outside the United States. App. 7a-14a. The majority acknowledged that the *HRC* class included "all Haitian aliens who are currently detained or who will in the future be detained on U.S. Coast Guard cutters * * * who were interdicted on the high seas pursuant to the United States Interdiction Program." *Id.* at 7a. But it held that the Haitian plaintiffs here are different, on the theory that Haitians interdicted after May 24 would not be detained "pursuant to the United States Interdiction Program" that was before the Eleventh Circuit, but under a "different" program that provides for repatriation without screening.

Id. at 9a-11a. The majority further decided that it would not in any event give preclusive effect to the *HRC* judgment because, in its view, the May 24 Executive Order constituted "an intervening change in the applicable legal context" that justified relitigation, "few judicial resources would be saved by collaterally estopping these plaintiffs," and "[t]he federal judicial hierarchy deserves this opportunity to consider the weighty issues on the merits." *Id.* at 12a-14a.

Reaching the merits, the majority held that 8 U.S.C. 1253(h) applies to aliens outside the United States, App. 15a-35a, thereby creating what it termed "an explicit 'circuit split'" with the Eleventh Circuit's ruling in *HRC II*. App. 14a. The majority acknowledged the presumption against extraterritorial application of federal statutes, but found the presumption overcome here by the reference in Section 1253(h) to "any alien." App. 15a-18a. The majority also rejected the argument, adopted by the Eleventh Circuit in *HRC*, that the various provisions in Part V of the INA (in which Section 1253(h) is located) that refer to aliens "in the United States" establish that Section 1253(h) is necessarily so limited. App. 19a-21a. The government argued that its interpretation of Section 1253(h) is supported by Article 33.1 of the U.N. Convention, to which Section 1253(h) was meant to conform, since the President, in Executive Order 12,807, has formally construed Article 33.1 not to apply to aliens outside the territory of a Contracting State. The majority, however, rejected the President's construction of Article 33.1, labeling it a "litigating posture" (App. 30a, 31a), and held that Section 1253(h) creates a parallel right of non-repatriation that is independent of the rest of Part V of the INA. See App. 23a-35a.

b. Judge Walker dissented. App. 43a-72a. He would have found the Haitian plaintiffs' claim barred by collateral estoppel, *id.* at 43a-52a, because the extraterritorial application of Section 1253(h) was litigated and decided in *HRC*, and because the present class—"all Haitian citizens who have been or will be screened in"—is wholly included within the *HRC* class of Haitians "who are currently detained or will in the future be detained." App. 45a-46a. Judge Walker disagreed with the majority's view that the May 24 Executive Order instituted a new interdiction program, and that the Executive Order therefore was an "intervening change" justifying a refusal to apply collateral estoppel. *Id.* at 46a-48a. Rather, he explained, relitigation is permitted only where, unlike here, "the legal grounds upon which th[e] prior litigation was resolved" have changed. *Id.* at 49a-50a (emphasis omitted). On the merits, Judge Walker disagreed with the majority's analysis of 8 U.S.C. 1253(h). Finding the statutory language ambiguous, App. 52a-55a, he concluded that the purpose of the 1980 amendments and the U.N. Convention made it clear that Section 1253(h) does not apply outside the United States. App. 55a-68a.

7. Later in the day on July 29, 1992, the district court entered a preliminary injunction in accordance with the Second Circuit's decision, barring repatriation to Haiti of "any interdicted Haitian" whose life or freedom would be threatened on account of his or her political opinion. App. 169a-170a. On August 1, 1992, this Court granted petitioners' application for a stay pending the filing (by August 24, 1992) and disposition of this petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

Executive Order No. 12,807 represents the President's considered response to a regional crisis involving a life-threatening situation on the high seas. This presidential determination is inextricably tied to the United States' overall immigration and foreign policy in the region. By enjoining the President's action, the court of appeals has intruded intolerably into matters assigned by the Constitution to the President—by interfering directly with the operation of military vessels under his command on the high seas, and by upsetting the delicate balance of

diplomatic and other measures instituted by the President to restore democratic rule in Haiti and resolve the broader crisis affecting that country.

The court of appeals' decision rests on four fundamental errors, each sufficient in itself to require reversal of the judgment below. *First*, judicial review is precluded because the INA expressly provides for judicial review of INA claims by aliens within the United States, but not those beyond our borders. *Second*, even if judicial review is not entirely foreclosed, respondents' claim under 8 U.S.C. 1253(h) is barred under the doctrine of collateral estoppel by the Eleventh Circuit's decision in *HRC* v. *Baker*. *Third*, the court of appeals' holding that 8 U.S.C. 1253(h) applies to aliens outside the United States cannot be squared with the presumption against extraterritorial application of Acts of Congress, the statutory text, its legislative history, and the parallel limitation of Article 33.1 of the U.N. Refugee Convention. *Fourth*, equitable principles foreclose an award of injunctive relief to aliens outside the United States that bars implementation of the President's directives in this sensitive area of military operations and foreign policy.

The effect of the decision below, if allowed to stand, can only be to encourage yet another massive outmigration from Haiti, which would revive the very crisis that the President ameliorated through the issuance of Executive Order No. 12,807. In light of these and other adverse effects on the Nation's foreign policy—as well as the direct conflict with the Eleventh Circuit's ruling regarding the territorial reach of 8 U.S.C. 1253(h)—review by this Court is plainly warranted. Indeed, after the Court granted our emergency application for a stay in light of the exigencies described above, respondents requested the court to grant certiorari and expedite consideration of the case on the merits.

A. The court of appeals did not even address petitioners' argument (Gov't C.A. Br. 59-62) that the Haitian plaintiffs in this case—aliens who are outside the

territory of the United States—have no basis for invoking the jurisdiction of U.S. courts to seek the extraordinary relief the courts below ordered. The only plausible basis for judicial review would be the cause of action established by the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* But as the Eleventh Circuit held in *HRC II*, App. 204a-209a, the INA impliedly "preclude[s] judicial review" under the APA: See 5 U.S.C. 701(a)(1).[7]

The INA prescribes detailed procedures for administrative and judicial review for aliens who claim to be refugees when they seek asylum or withholding of deportation, but only if they are "physically present in the United States or at a land border or port of entry" (8 U.S.C. 1158(a) (asylum)), "in the United States" (8 U.S.C. 1253(a) and (h) (withholding of deportation)), or "within the United States" (8 U.S.C. 1105a(a) (judicial review of orders of deportation and exclusion)). By contrast, 8 U.S.C. 1157, which confers discretionary authority on the President and the Attorney General with respect to aliens who seek refugee status while *outside* the United States, does not include any provision for judicial review. See *HRC II*, App. 205a-206a. Accordingly, Congress's intent to preclude judicial review for such aliens under the APA is " 'fairly discernible' in the detail of the legislative scheme." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 351 (1984); cf. *Ardestani* v. *INS*, 112 S. Ct. 515, 518-519 (1991). Where, as here, "a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of

[7] For the reasons stated in Point B, *infra*, the Eleventh Circuit's holding that the INA precludes judicial review pursuant to the APA is binding upon the Haitian plaintiffs here under collateral estoppel principles. The Eleventh Circuit went on to hold in *HRC II* that the Haitian plaintiffs likewise have no independent cause of action under Section 1253(h). App. 214a-216a. However, the Eleventh Circuit did not hold (as it should have done) that there is no basis for a cause of action "independent" of the APA. Instead, it rejected the interdictees' claim on the merits.

particular persons, judicial review of those issues at the behest of other persons [is] impliedly precluded." 467 U.S. at 349; see also *United States* v. *Fausto*, 484 U.S. 439, 448-449 (1988). This result conforms to Congress's traditional unwillingness to permit judicial review of immigration decisions concerning aliens outside the United States who have "never presented [themselves] at the borders." See *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184 n.3 (1956).[8]

B. The decision below also flouts the preclusive effect of the Eleventh Circuit's judgment in *HRC II*. "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980). As the court of appeals acknowledged, App. 9a, this rule is fully applicable to the judgment in a class action. See *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867, 874 (1984).

The Eleventh Circuit held in *HRC II* that 8 U.S.C. 1253(h) does not apply to aliens who are not "in the United States." App. 214a-216a. That decision bound a class of all Haitians who "are currently detained or who in the future will be detained * * * pursuant to the United States Interdiction Program and who are being denied * * * procedural rights." App. 7a. The Haitian plaintiffs here fall squarely within that definition: they have been or will be interdicted on the high seas, and as in *HRC*, they claim that they have not been or will

[8] This principle is reflected in the settled rule that visa decisions by U.S. consular officers are unreviewable. *Wan Shih Hsieh* v. *Kiley*, 569 F.2d 1179, 1181 (2d Cir.), cert. denied, 439 U.S. 828 (1978); *Li Hing of Hong Kong, Inc.* v. *Levin*, 800 F.2d 970, 971 (9th Cir. 1986); *Te Kuei Liu* v. *INS*, 645 F.2d 279, 285 (5th Cir. 1981); *Pena* v. *Kissinger*, 409 F. Supp. 1182, 1185-1188 (S.D.N.Y. 1976). See also *HRC II*, App. 207a-209a.

not be suitably screened to determine whether they are refugees.[9]

The court of appeals advanced two reasons for refusing to accord preclusive effect to the *HRC* judgment. First, it concluded that the plaintiffs here are different from those in *HRC*. In the court's view, the "United States Interdiction Program" referred to in the *HRC* class definition is no longer in effect, because at that time Haitian migrants were screened following interdiction, but now they are not. See App. 9a-10a. As Judge Walker pointed out in dissent (*id.* at 46a-48a), this distinction is entirely artificial. The term "interdiction program" in the *HRC* class definition referred to the program under which Haitian migrants are stopped and prevented from coming directly to the United States. That program was established in 1981 pursuant to a Presidential proclamation and the agreement with Haiti, and the May 24 Executive Order did not terminate it. Although the May 24 Executive Order changed some of the post-interdiction procedures under the program, those changes do not undermine the identity of the parties who have challenged the government's procedures as inadequate under 8 U.S.C. 1253(h) both before *and* after that Order.

Second, the court of appeals held that relitigation was justified on the ground that the May 24 Executive Order constituted "an intervening change in the applicable legal context." App. 12a.[10] However, that exception applies

[9] See page ii, *supra*. The only class actually certified by the district court to date consists of the lesser-included class of Haitians who have not only been detained, but also screened in. App. 162a.

[10] The court of appeals did not suggest that the May 24 Executive Order constituted a change in the *facts* essential to the judgment in *HRC* that rendered collateral estoppel inapplicable. The Eleventh Circuit did not rest its holding on the existence of the procedures that were then in effect for screening interdictees; it found 8 U.S.C. 1253(h) altogether inapplicable to the class of present and future

only where there have been "modifications in 'controlling legal principles,' [which] * * * could render a previous determination inconsistent with prevailing doctrine." *Montana* v. *United States*, 440 U.S. 147, 161 (1979). There has been no such change in the controlling legal principles here: Congress has not amended 8 U.S.C. 1253(h), and this Court has not rendered any decision undermining the Eleventh Circuit's analysis. See 18 C. Wright *et al.*, *Federal Practice and Procedure* § 4425, at 259 (1981).[11]

The court of appeals also adverted to the exception to the application of collateral estoppel for successive cases involving "unmixed questions of law," App. 12a, although the court omitted any mention of the further requirement that the successive cases be ones involving "substantially unrelated claims." See *Montana*, 440 U.S. at 162-164; *United States* v. *Moser*, 266 U.S. 236, 242 (1924). The precise scope of this exception "may be difficult to delineate," but this case, like *Montana*, "poses no such conceptual difficulties," because respondents' legal "demands" under 8 U.S.C. 1253(h) "are closely aligned in time and subject matter" to those in *HRC*. 440 U.S. at 163; see also *United States* v. *Stauffer Chem. Co.*, 464 U.S. 165, 172 (1984).

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interdictees. See App. 84a-85a (Walker, J., dissenting); compare *Montana* v. *United States*, 440 U.S. 147, 159-160 (1979).

[11] The court of appeals also suggested that preclusion should be dispensed with in the interest of the "equitable administration of the laws," based on its view that the government had contravened representations it made in its brief in opposition to the certiorari petition in *HRC*. App. 13a-14a. However, as we explained in our July 30 application for a stay (at 21-22 & n.6), although the brief in opposition in *HRC* described the government's then-current policy, the entire thrust of the government's position was that the President must retain flexibility to respond to international developments free from judicial interference. In any event, the contents of that filing in no way undermine the finality or binding effect of the judgment in *HRC*. See App. 51a (Walker, J., dissenting).

Moreover, the refusal by the courts below to apply collateral estoppel completely frustrated the purposes of that doctrine: to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *McCurry*, 449 U.S. at 94. The court of appeals addressed only the second of these purposes, expressing the view that "judicial economy" is not undermined here because "few judicial resources would be saved by collaterally estopping these plaintiffs." App. 12a-13a. The court was wrong. The course of this litigation—which has replicated the *HRC* experience of a sequence of temporary restraining orders and preliminary injunctions, expedited briefing and hearings, and repeated stay applications to the court of appeals and this Court—has scarcely served the interests of judicial economy. In addition, the court of appeals entirely disregarded the substantial interests of the United States in avoiding relitigation of issues that were resolved in its favor in *HRC* after a full and fair hearing, and in avoiding reinstatement of intrusive injunctions of the kind that the Eleventh Circuit set aside in that case.

C. As to the merits, the court of appeals plainly erred in holding that 8 U.S.C. 1253(h) prohibits the Coast Guard from implementing the President's policy of repatriating interdicted Haitian migrants directly to Haiti.

Section 1253(h) must be construed in light of the "longstanding principle of American law" that an Act of Congress is presumed "to apply only within the territorial jurisdiction of the United States" unless there is a "clearly expressed." "affirmative intention" by Congress to the contrary. *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991) (quoting *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949), and *Benz* v. *Compania Naviera Hildago, S.A.*, 353 U.S. 138, 147 (1957)); see also *Argentine Republic* v. *Amerada Hess*

Shipping Corp., 488 U.S. 428, 440 (1989) (applying presumption to the high seas). That is especially so where, as here, it is contended that an Act of Congress confers a right on *aliens* outside the United States that is enforceable in U.S. courts. *Arabian American Oil Co.*, 111 S. Ct. at 1234; *Foley Bros.*, 336 U.S. at 286. The requirement of a "clear statement" is imposed to "assure[] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved." *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2170 (1991). Moreover, in this setting, the presumption against extraterritoriality is reinforced by the principle that statutes should be construed so as not to interfere with foreign policy, *Weinberger* v. *Rossi*, 456 U.S. 25, 31-32 (1982); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19 (1963); *Benz*, 353 U.S. at 147, or the prerogatives of the President, *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2775-2776 (1992).

In this case, there is no affirmative indication—much less a "clear statement"— that Congress intended to apply Section 1253(h) outside the United States, and thereby to confer on aliens seeking illegal entry into the United States a right to avoid repatriation. Nor is there any indication that Congress "faced" the "critical matters" that would be involved in conferring such a right on aliens outside the United States that can be enforced in U.S. courts against the Executive Branch officials responsible for the operation of military vessels on the high seas pursuant to orders of the President.

1. Paragraph (1) of Section 1253(h) provides:

> The Attorney General shall not deport or return any alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

The court of appeals believed that the reference to "any alien" made it "plain" and "unambiguous" that Section 1253(h) applies to aliens outside the United States, since "aliens are aliens, regardless of where they are located." App. 15a-16a, 21a, 23a. This Court has made clear, however, that such general language does *not* overcome the presumption against extraterritoriality. See *Foley Bros.*, 336 U.S. at 282 (statute requiring eight-hour day provision in "[e]very contract made to which the United States * * * is a party" inapplicable to contracts for work performed in a foreign country); *Arabian American Oil Co.*, 111 S. Ct. at 1231-1232 (broad definitions of "employer" and "commerce" insufficient to sustain extraterritorial application of Title VII).[12] The court below cited no other affirmative evidence in the text of Section 1253(h) that it applies to aliens outside the United States—or, in particular, that it prevents the *Coast Guard* from carrying out the President's orders to repatriate Haitians interdicted on the high seas.[13] All indications, in fact, are to the contrary.

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[12] See also *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2150 n.4 (1992) (Stevens, J., concurring in the judgment) (Endangered Species Act's requirement that "[e]ach Federal agency" shall insure that "any action" it funds or carries out does not jeopardize "any" protected species "is not sufficient to overcome the presumption against the extraterritorial application of statutes").

[13] The court did point out that the word "return" means "to bring, send, or put (a person or thing) back to or in a former position." App. 22a (quoting *Webster's Third New International Dictionary* 1941 (1986)). But that definition is fully consistent with our position, under which the Attorney General may not "send" an alien from the United States "back" to Haiti if he would be threatened with persecution there. The court of appeals found it significant that although the word "return" in Section 1253(h) is followed by the phrase "to a country [where he would be threatened with persecution]," Congress "made no mention of where the alien (who may be anywhere, within or without the United States) must be returned 'from.'" App. 22a. Such inferences from congressional

In the first place, Section 1253(h) applies only to the actions of the Attorney General. That is not surprising, since it is located in the part of the INA concerned with procedures for deporting an alien from the United States —a subject under the Attorney General's responsibility. See page 21, *infra*. Neither Section 1253(h) nor Part V of the INA addresses the responsibilities of the Coast Guard or any other agency that might encounter a potential refugee outside the territory of the United States. Moreover, Section 1253(h) is triggered only "if the Attorney General determines" that the alien would be threatened with persecution. Cf. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988). The Attorney General has made no such determination with respect to Haitian migrants who might be repatriated under the President's May 24 Executive Order. Instead, the President has decided that refugee determinations concerning Haitians who want to enter the United States will be made in Haiti, pursuant to 8 U.S.C. 1157.

Paragraph (2) of Section 1253(h), which carves out exceptions to the prohibition in paragraph (1), confirms that it applies only to aliens in the United States. Of particular relevance here, paragraph (2)(C) provides that the benefits of Section 1253(h) are not available to an "alien [who] has committed a serious nonpolitical crime outside the United States *prior to the arrival of the alien in the United States*" (emphasis added). Thus, this exception—the "only geographic reference" in the Section, *Defenders of Wildlife*, 112 S. Ct. at 2150 (Stevens, J., concurring in the judgment)—presupposes that the alien involved has arrived in the United States. Compare *Arabian American Oil Co.*, 111 S. Ct. at 1234 (similarly noting Title VII's mention of "states" but not foreign nations).

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silence, however, are insufficient to overcome the presumption. *Arabian American Oil Co.*, 111 S. Ct. at 1231-1232, 1233-1234. That is especially so since the phrase "to a country" modifies "deport" as well as "return," and "deport" indisputably refers to removal of an alien *from* the United States.

2. The interpretation of Section 1253(h) that is evident from its terms is also compelled by the statutory context in which it appears. Section 1253(h) is in Part V of the INA, 8 U.S.C. 1251-1260, which governs the standards and procedures for expelling aliens from the United States. Section 1251, entitled "Deportable aliens," identifies which aliens are subject to expulsion. It begins by stating that "[a]ny alien *in the United States* * * * shall, upon the order of the Attorney General, be deported" if he falls within any of a number of enumerated categories. 8 U.S.C. 1251(a)(1) (emphasis added). Section 1252, entitled "Apprehension and deportation of aliens," then provides for arrest and detention; deportation proceedings before a special inquiry officer; a final order of deportation; and removal of the alien "from the United States" by the Attorney General. 8 U.S.C. 1252(a)-(c).

Section 1253, in turn, is entitled "Countries to which aliens shall be deported." Its inapplicability to aliens outside the United States is established by subsection (a), which states that "[t]he deportation of an alien *in the United States* * * * shall be directed by the Attorney General," either to a country designated by the alien that is willing to accept him, or to another country. 8 U.S.C. 1253(a) (emphasis added); see *INS* v. *Doherty*, 112 S. Ct. 719, 722-723 (1992). Subsection (h) of 8 U.S.C. 1253, at issue here, simply places a limitation on the countries (specified in subsection (a)) to which the Attorney General may send an alien who is unlawfully "in the United States." Thus, the text and structure of Part V of the INA refute the notion that Section 1253(h) confers a freestanding right upon aliens anywhere in the world. See *McCarthy* v. *Bronson*, 111 S. Ct. 1737, 1740 (1991); *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988).

3. The limited territorial scope of Section 1253(h) is also supported by the parallel scope of Article 33 of the

U.N. Convention. As this Court has noted, Section 1253(h) was revised by the Refugee Act of 1980 (Pub. L. No. 96-212, § 203(e), 94 Stat. 107) to conform its language to Article 33. See *INS* v. *Stevic*, 467 U.S. 407, 421 (1984). It therefore is significant that the legislative history of the 1980 Act shows that Congress understood the Convention to "insure the fair and humane treatment for refugees *within the territory of the contracting states*." H.R. Rep. No. 608, 96th Cong., 1st Sess. 17 (1979) (emphasis added). The President, in accordance with the considered opinions of the Attorney General and the Secretary of State (see App. 30a-31a), set forth the same interpretation in Section 2 of his May 24 Executive Order, which states that the terms of Article 33 "do not extend to persons located outside the territory of the United States." This interpretation by the Executive is entitled to "great weight." *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961). Moreover, contrary to the court of appeals' view, that interpretation is supported by the text of Article 33 and the Convention as a whole, the negotiating history, and the United States' accession to and construction of the Convention.

a. Article 33 contains no express statement or other affirmative indication that it was intended to impose obligations on a Contracting State outside its own territory. Paragraph 1 of Article 33 provides that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened" on account of his political opinion. Art. 33.1, 19 U.S.T. at 6276. The most natural reading of this language is that it expresses an essentially unitary prohibition against removal of a refugee *from* the "Contracting State" *to* a foreign territory in the specified circumstances, irrespective of the manner in which the removal might be accomplished. The prohibition against "expelling" plainly has in mind a refugee who is within the territory of the

Contracting State. The succeeding phrase rounds out (and prevents circumvention of) that prohibition by providing that a refugee is likewise not to be sent ("return[ed]") from the Contracting State to the foreign territory in any *other* "manner."

This conclusion is reinforced by the word "refouler," which immediately follows (and thus gives content to) "return" in paragraph 1. Significantly, one meaning of the French word "refouler" is to "expel (aliens)." *Cassell's French Dictionary* 627 (1978). Under this meaning, "return," like "expel," connotes ejection of an alien from within the territory of the Contracting State. The court of appeals rejected this interpretation because it believed that it would render the term "return ('refouler')" redundant by effectively revising Article 33.1 to forbid a Contracting State to "expel or expel" an alien. App. 29a. The court missed the point. Insertion of the French word "refouler" after "return" in the English text demonstrates that the latter is used as a term of art. Although its meaning is similar to "expel," the two terms are not identical. To the contrary, as the negotiating history of the Convenion shows (see pages 24-25, *infra*)—and as the court of appeals elsewhere acknowledged (App. 29a)—"expel" is also a term of art in this setting, referring to the formal process for removing an alien who was admitted to the country. Accordingly, "expel" and "return ('refouler')" describe two different ways or situations in which an alien might be physically removed from the Contracting State's territory.[14]

This interpretation is also reflected in paragraph 2 of Article 33, which states that the benefit of nonrefoule-

[14] The court of appeals also cited respondents' reliance on other meanings of the French word "refouler," such as "drive back" or "repulse." App. 28a; see Resp. C.A. Br. 17 (citing M. Dubois, *Dictionnaire Larousse* 631 (1981)). At the very least, however, the existence of several French definitions is fatal to the court of appeals' conclusion that the "plain language" of Article 33.1 compels the interpretation it adopted. See App. 26a, 29a.

ment may not be claimed by a refugee who is a danger to the security of "the country in which he is." Thus, the only express territorial reference in Article 33 contemplates that the refugee must be "in" the "country" concerned.

The Convention as a whole lends still further support to this reading. As the court of appeals recognized, App. 26a-28a, the principle of territorial limitation is woven into numerous Articles of the Convention. See Arts. 4, 15, 17.1, 18, 19, 21, 23, 24, 26 and 28. Furthermore Article 40, entitled "Territorial Application Clause," addresses that issue across the board. 19 U.S.T. 6279. Paragraph 1 of Article 40 provides that a State may "declare that this Convention shall *extend* to all or any of the territories for the international relations of which it is responsible." *Ibid.* (emphasis added). Accordingly, Article 40—which the majority below did not even mention—establishes that a Contracting State's obligations under Article 33 do *not* automatically extend beyond its sovereign territory, even to other territories it administers—much less to the high seas and elsewhere throughout the world.[15]

b. Any lingering doubt on the extraterritoriality issue is dispelled by the official minutes of the Conference of Plenipotentiaries that adopted the language of Article 33. The Swiss delegate expressed the view at one session that "expulsion" "related to a refugee already admitted into a country," while "return (*'refoulement'*)" related to a "refugee already within the territory but not yet [a] resident." U.N. Doc. A/CONF. 2/SR.35 at 21 (1951); U.N. Doc. A/CONF. 2/SR.16 at 6 (1951). The representatives of France, Belgium, Germany, Italy, the Netherlands, and Sweden agreed. At a subsequent session, the representative of the Netherlands stated that, based on his intervening conversations with other representatives, there appeared to be a "general consensus" in

[15] This principle of territorial limitation is carried forward in the 1967 Protocol. See Art. 7.4, 19 U.S.T. at 6228.

favor of the Swiss interpretation. He then asked to have the record show that the Conference was in agreement with this interpretation, "[i]n order to dispel any possible ambiguity" and to ensure that "mass migrations across frontiers or of attempted mass migrations"—the precise context of this case—are "not covered by article 33." U.N. DOC. A/CONF. 2/SR.35 at 21. "There being no objection," the President of the Conference ordered that interpretation "placed on the record." *Ibid.* He further suggested that "refouler" be placed in brackets after "return" every place the latter word appears in the English text, and that suggestion was "adopted unanimously." *Id.* at 21-22. On this record, the word "refouler" can only be understood to embody a deliberate decision by the Contracting States to incorporate the territorial limitation we urge into the text of Article 33.1. App. 63a-66a (Walker, J., dissenting); *HRC* v. *Gracey*, 809 F.2d 794, 840 & nn. 132, 133 (D.C. Cir. 1987) (Edwards, J., concurring and dissenting).

c. The inapplicability of Article 33 to the repatriations challenged here is confirmed by the circumstances of the United States' ratification of the 1967 Protocol. The United States acceded to Article 33 through the Protocol on the understanding that our immigration laws already provided the protections that Article 33 required, and that Article 33 therefore could be implemented through Section 1253 as it then existed. *Stevic*, 467 U.S. at 417-418. Significantly, at the time, this Court had long since held, in *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958), that Section 1253(h) did not even apply to aliens who were physically present in the United States but subject to exclusion proceedings. *Stevic*, 467 U.S. at 415. *A fortiori*, Haitian migrants affected by the President's May 24 Executive Order, who are altogether outside the United States, enjoy no rights under Article 33.

This understanding represents the State Department's longstanding position, both before and after passage of the Refugee Act of 1980. It is reflected as well

in post-Protocol efforts to draft a broader convention on territorial asylum, which proceeded from the premise that the prohibition in Article 33 applies only to aliens within the territory of the Contracting State. See App. 30a; Gov't C.A. Br. 46-50. Accordingly, there is no basis for the court of appeals' unseemly attempts to dismiss as a mere "litigating posture" (App. 31a, 32a) the interpretation of Article 33 formally adopted by the President on behalf of the United States as party to the Convention and as a member of the international community.[16]

4. In nevertheless holding that Section 1253(h) has a worldwide scope, the court of appeals found it significant that the pre-1980 version contained only the word "deport" and referred to any alien "within the United States" (see 8 U.S.C. 1253(h) (1976)), and that Congress added the word "return" and deleted the latter phrase when it amended Section 1253(h) in 1980. App. 15a, 19a, 20a. There are, however, two far more persuasive explanations for what Congress did.

First, this Court has already held that the 1980 revisions to Section 1253(h) were clarifying amendments designed to conform its language to that of Article 33. *Stevic*, 467 U.S. at 421; *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 436-437 (1987). That result was accomplished by inserting "or return" and deleting "within the United

[16] The court of appeals relied on a 1981 opinion of the Office of Legal Counsel in which OLC concluded that the proposed interdiction of Haitian flag vessels would not violate the Convention and observed that "[i]ndividuals who claim that they will be persecuted * * * must be given an opportunity to substantiate their claims." 5 Op. Off. Legal Counsel 242, 248 (1981); see App. 31a. The latter observation was not accompanied by an analysis of the Convention's text or negotiating history or the understanding of the Convention's scope upon ratification. In 1985 the Department of Justice, in *HRC* v. *Gracey*, *supra*, took the position that the Convention does not apply outside the United States. Furthermore, in an opinion dated December 12, 1991, OLC concurred in the conclusion of the Department of State's Legal Adviser and expressly reversed the conclusory statement in the 1981 opinion relied upon by the court below. App. 31a.

States," since Article 33 also contains "or return" but nothing parallel to "within the United States."

Second, prior to the 1980 amendments, this Court had held in *Leng May Ma* that the benefits of Section 1253(h) were not available to "excludable" aliens who were apprehended at the border and paroled into the United States. That holding rested on the Court's conclusion that such aliens were not among those "within the United States," as that phrase was used in Section 1253(h). 357 U.S. at 190. As a result, if Congress wanted to extend the benefits of 1253(h) to such aliens in 1980, one way to accomplish that result was to delete the phrase "within the United States." As Judge Walker pointed out, there is support in the legislative history for the propostion that the 1980 revisions were intended to do just that. See App. 58a (quoting H.R. Rep. No. 608, *supra*, at 30) (changes were made to "require * * * the Attorney General to withold deportation of aliens who qualify as refugees and [who are in exclusion as well as deportation proceedings]"). And as Judge Walker also pointed out, App. 59a, the addition of "return" may serve to clarify that intent, because "deport," as used in Part V of the INA, does not technically encompass removal of excludable aliens, *Leng May Ma*, 357 U.S. at 187, while "return" does. See also *HRC* v. *Gracey*, 809 F.2d at 840 (Edwards, J., concurring and dissenting) (similarly concluding that Section 1253(h), as amended, applies in exclusion proceedings).

Either of the foregoing explanations for the 1980 revisions is plausible. By contrast, the court of appeals' interpretation is wholly implausible, for it ascribes to Congress the intent to use a two-word phrase buried in the body of Section 1253(h)—"or return"—to confer a free-standing right of non-repatriation on aliens throughout the world. Any inference of such an intent is refuted both by the text of the 1980 amendments themselves, which added the language in subparagraph 2(C) of Section 1253(h) that presupposes the alien's "arrival * * * in

the United States," and by the legislative history of the amendments, which shows that Congress understood the Convention (and therefore the conforming changes in Section 1253(h)) to apply only to "refugees within the territory of the contracting states." H.R. Rep. No. 608, *supra*, at 17.

D. We have explained in Point A, *supra*, that respondents' judicial assault on the conduct of the interdiction program is precluded by the INA, which furnishes a right of judicial review only to aliens within the United States. But even if review is not statutorily foreclosed, the APA does not excuse courts from their duty "to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702(1). That provision was enacted in 1976, in response to recommendations by the Administrative Conference (H.R. Rep. No. 1656, 94th Cong., 2d Sess. 4 (1976); S. Rep. No. 996, 94th Cong., 2d Sess. 3 (1976)), to ensure that the APA's waiver of sovereign immunity does not allow courts to "decide issues about foreign affairs, military policy, and other subjects inappropriate for judicial action." See *Sovereign Immunity: Hearing Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 135 (1970) (report of Administrative Conference Committee on Judicial Review). The court of appeals' refusal to dismiss this suit in equity, and its decision instead to order injunctive relief, transgress this fundamental limitation.

Since the President issued the new Executive Order on May 24, outmigration from Haiti has largely dissipated. The injunctive relief ordered by the court of appeals, if allowed to stand, will recharge the now-dormant migrant crisis, with all its attendant problems: loss of life; interference with the conduct of foreign policy, the operation of military vessels on the high seas, and the use of a U.S. military base on hostile foreign soil in Cuba; and diversion of the limited resources of the State

Department, Navy, Coast Guard, and INS from the tasks to which they have been assigned by the President and Congress. It will also impede the flexibility the President requires to address the migrant problem within the broader context of the sensitive and fluid situation affecting Haiti generally, which is the subject of ongoing diplomatic and economic measures. And it will undermine the ability of this Nation to speak with one voice, through the President, regarding the scope of the United States' obligations under Article 33 of the Convention, which the court of appeals, in the course of its opinion, has unilaterally extended to the high seas and throughout the world. Especially in the absence of an Act of Congress that purports to extend the equitable powers of federal courts into this sensitive area with far greater specificity than the general judicial review provisions of the APA, "[t]he separation of powers problems present here make this virtually a textbook case for refusing such discretionary relief." *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1561 (D.C. Cir. 1984) (en banc) (Scalia, J., dissenting), vacated on other grounds, 471 U.S. 1113 (1985); see also *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985).[17]

[17] The injunctive relief restraining the operations of U.S. military vessels on the high seas is all the more inappropriate because it was sought by and granted to aliens who not only are outside the United States, but are nationals and residents of the foreign nation that is the very subject of the President's actions. The President, to whom the Constitution and Acts of Congress assign primary responsibility in this area, has assessed the overall situation and determined that the interests of the Haitian nationals concerned and other interests at stake are properly served by the policy he instituted on May 24: direct repatriation to Haiti, albeit with (i) an exception for interdictees who are threatened with immediate and grave physical danger (see note 5, *supra*), and (ii) provisions for the orderly processing of requests by Haitian nationals for admission to the United States as refugees under 8 U.S.C. 1157, which Congress enacted in 1980 specifically to govern the admission of refugees from outside the United States. It is not the role of a U.S.

For the same reasons—and in light of the acknowledged conflict with the Eleventh Circuit's decision in *HRC*—the Court should grant review of the court of appeals' extraordinary decision enjoining a central feature of the interdiction program established by the President.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1992

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court to second-guess the adequacy of this admissions mechanism fashioned by Congress and the President, or to "balance" the interests of aliens abroad in circumventing that mechanism against other interests the court might deem relevant.

More than 9000 Haitian nationals have availed themselves of the opportunity to file an application under Section 1157 at the U.S. Embassy in Haiti. Although many residents of Haiti might choose to set out for the United States without prior approval under that Section, nothing in the record supports the notion that there is a threat of persecution to members of the respondent class of such pervasiveness and magnitude that it would render that avenue of relief meaningless or justify the sweeping injunctive relief ordered by the court of appeals—even if we assume, *arguendo*, that the courts below could properly weigh the competing equities in this setting.

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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 2023—August Term 1991

Argued: June 26, 1992 Decided: July 29, 1992

Docket No. 92-6144

HAITIAN CENTERS COUNCIL, INC.; NATIONAL COALITION FOR HAITIAN REFUGEES, INC.; IMMIGRATION LAW CLINIC OF THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION OF NEW HAVEN, CONNECTICUT; DR. FRANTZ GUERRIER; PASCAL HENRY; LAURITON GUNEAU; MEDILIEU SOREL ST. FLEUR; DIEU RENEL; MILOT BAPTISTE; JEAN DOE; ROGES NOEL; on behalf of themselves and all others similarly situated; A. IRIS VILNOR; MIREILLE BERGER; YVROSE PIERRE; and MATHIEU NOEL, on behalf of themselves and all others similarly situated,
PLAINTIFFS-APPELLANTS,

-against-

GENE MCNARY, Commissioner, Immigration and Naturalization Service; WILLIAM P. BARR, Attorney General; Immigration and Naturalization Service; JAMES BAKER, III, Secretary of State; Rear Admiral ROBERT KRAMEK; Admiral KIME; Commandants, United States Coast Guard; and Commander, U.S. Naval Base, Guantanamo Bay,
DEFENDANTS-APPELLEES.

Before: NEWMAN, PRATT, and WALKER, *Circuit Judges.*

Judge Newman, with whom Judge Pratt joins, concurs in a separate opinion.

Judge Walker dissents in a separate opinion.

PRATT, *Circuit Judge*:

On May 23, 1992, President George Bush issued an executive order which allowed the Coast Guard to intercept boatloads of Haitian refugees at sea and to return them to their persecutors in Haiti. The narrow issue we decide on this appeal is whether the government's actions, taken to implement this order, comport with § 243(h)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h)(1). We hold that they do not.

FACTS AND BACKGROUND

The factual and procedural background to this lawsuit, including the volatile political climate in Haiti, is well-chronicled in our prior decision, *Haitian Centers Council, Inc. v. McNary*, Nos. 92-6090, 92-6104, slip op. 4371, 4374-85 (2d Cir. June 10, 1992) (*HCC I*), familiarity with which is assumed. This particular appeal, however, concerns events that primarily took place after the record in that case had been developed.

On May 23, 1992, President Bush signed an executive order which has come to be known as the "Kennebunkport Order". In part, it reads as follows:

> *Section 1.* The Secretary of State shall undertake to enter into, on behalf of the United States,

> cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea.
>
> *Sec. 2.* (a) The Secretary of the Department in which the Coast Guard is operating, in consultation, where appropriate, with the Secretary of Defense, the Attorney General, and the Secretary of State, shall issue appropriate instructions to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens by sea and the interdiction of any defined vessel carrying such aliens.
>
> * * *
>
> (c) Those instructions to the Coast Guard shall include appropriate directives providing for the Coast Guard:
>
> (1) To stop and board defined vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons or violations of United States law or the law of a country with which the United States has an arrangement authorizing such action.
>
> (2) To make inquiries of those on board, examine documents and take such actions as are necessary to carry out this order.
>
> (3) *To return the vessel and its passengers to the country from which it came,* or to another country, when there is a reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist; provided, however, that the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent.

(d) These actions, pursuant to this section, are authorized to be undertaken only beyond the territorial sea of the United States.

Sec. 3. This order is intended only to improve the internal management of the Executive Branch. Neither this order nor any agency guidelines, procedures, instructions, directives, rules or regulations implementing this order shall create, or shall be construed to create, any right or benefit, substantive or procedural (including without limitation any right or benefit under the Administrative Procedure Act), legally enforceable by any party against the United States, its agencies or instrumentalities, officers, employees, or any other person. Nor shall this order be construed to require any procedures to determine whether a person is a refugee.

* * *

/s/ George Bush

THE WHITE HOUSE

May 23, 1992.

Exec. Order 12,807, 57 Fed. Reg. 23,133, 23,133-34 (1992) (emphasis added). Although the Kennebunkport Order did not specifically mention Haiti, the next day, when the order was released to the national news media, it was accompanied by a statement from the White House Press Secretary, which noted that the President had "issued an executive order which will permit the U.S. Coast Guard to begin returning Haitians picked up at sea directly to Haiti."

The Coast Guard followed orders, and immediately began to intercept numerous boatloads of Haitians in

international waters, and to forcibly return them to Haiti without determining whether they would be thereupon persecuted.

On May 28, 1992, plaintiffs sought a temporary restraining order before Judge Johnson, challenging the actions under the new policy as *ultra vires*, as well as violative of (1) § 243(h)(1) of the INA, (2) Article 33 of the 1954 Convention relating to the Status of Refugees, (3) the 1981 U.S.-Haiti Executive Agreement, (4) the Administrative Procedure Act, and (5) the equal protection component of the fifth amendment's due process clause. The district court held a hearing, at which the plaintiffs presented not only evidence demonstrating the heightened political repression currently occurring in Haiti, but also evidence that specific plaintiffs who had been returned have since been abused, were tortured, and were hiding in fear of their lives.

Judge Johnson construed the plaintiffs' motion as one for a preliminary injunction. Although he called the United States' actions "unconscionable", "particularly hypocritical", and "a cruel hoax", he nonetheless denied the injunction. Relying on his prior decision that the right to counsel under 8 U.S.C. § 1362 and 8 C.F.R. § 208.9 is limited to aliens found in the United States, Judge Johnson concluded that "Section 243(h) is similarly unavailable as a source of relief for Haitian aliens in international waters." He also concluded that although "[o]n its face, Article 33 imposes a mandatory duty upon contracting states such as the United States not to return refugees to countries in which they face political persecution", our prior decision in *Bertrand v. Sava*, 684 F.2d 204, 218 (2d Cir. 1982) held that the Convention's provisions are not self-executing; thus, Judge

Johnson felt he could not grant plaintiffs the requested relief. He did not address the other issues raised by the plaintiffs.

We have jurisdiction over this expedited appeal under 28 U.S.C. § 1292(a)(1).

DISCUSSION

Although this is an appeal from the denial of a preliminary injunction, only questions of law are presented, and our usual *de novo* review applies. There is no challenge to Judge Johnson's finding that "the Plaintiffs undeniably make a substantial showing of irreparable harm"; thus, if the district court's view of the law was incorrect, then an injunction should issue.

On appeal, the plaintiffs wield the full arsenal of arguments that they wielded in the district court—§ 243(h) of the INA, Article 33 of the Refugee Convention, the 1981 U.S.-Haiti agreement, the APA, and the fifth amendment's equal protection component. The government addresses each of these contentions, and adds two of their own: (1) that since the subject plaintiffs are now back in Haiti, they stand in the same position as the "screened-out" plaintiffs in a similar federal action commenced in Florida, and are thus bound under principles of collateral estoppel by the eleventh circuit's holding in *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498 (11th Cir.) (*per curiam*) (*HRC v. Baker*), *cert. denied*, 112 S. Ct. 1245 (1992); and (2) that the executive order falls within the President's constitutional powers as commander-in-chief and his inherent authority over foreign relations, and was issued "pursuant to an express or implied authorization of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

We address the dispositive contentions in turn.

A. *Preclusive Effect of* HRC v. Baker.

The administration's policy toward Haitian refugees has been the subject of litigation in two actions, one brought in Florida and the other in New York. Classes of Haitian refugees have been certified in both actions. *See* Fed. R. Civ. P. 23(a), 23(b)(2). The class in the Florida action, certified on December 3, 1991, was defined as

> all Haitian aliens who are currently detained or who will in the future be detained on U.S. Coast Guard cutters or at Guantanamo Naval base who were interdicted on the high seas pursuant to the United States Interdiction Program and who are being denied First Amendment and procedural rights.

This "Florida class" is focused primarily on Haitians who have been "screened out" (*i.e.* interviewed by INS officers and found not to have a credible fear of persecution upon return to Haiti), although we have previously noted that it was defined in an "overly broad" fashion which did not fairly and adequately represent the interests of the plaintiffs herein. *See HCC I*, slip op. at 4392. In contrast, the class in the New York action, conditionally certified on April 7, 1992, was defined as "All Haitians who have been or will be 'screened in' ". *See id.* at 4390-91.

In *HRC v. Baker*, the eleventh circuit was presented with a "claim that [the Florida class plaintiffs] have judicially enforceable rights under the INA because the defendants' actions violate 8 U.S.C. § 1253(h) as it was amended by the Refugee Act." 953 F.2d

at 1509. The eleventh circuit concluded that the plaintiffs there (who were interdicted on the high seas but had not reached the United States, its borders, or any port of entry) could not assert a claim based on this section of the INA. *Id.* at 1510. Arguably, the eleventh circuit also passed upon the Article 33 issue. *Cf. id.* at 1508.

Plaintiffs identify three sub-groups within the New York class of "[a]ll Haitian citizens who have been or will be 'screened-in' " which are being harmed by the executive actions taken pursuant to the Kennebunkport order:

> (1) some 150 Haitians who have been repatriated even though previously screened-in;
>
> (2) thousands of Haitians with credible fears of persecution who are being or will be interdicted, but should have been screened-in; and
>
> (3) those Haitians on Guantanamo Naval Base who are now unscreened and would be screened-in but for the summary repatriation which the government may seek.

Additionally, there are other plaintiffs, screened out under the program that was in place prior to the Kennebunkport Order, who, although not members of the New York class certified by Judge Johnson, are nonetheless plaintiffs in this case. The government argues that all of these plaintiffs are enveloped in the Florida class, and are thus collaterally estopped from relitigating the § 243(h) issue and the Article 33 issue.

1. *Different parties.*

It is axiomatic that "a judgment in a properly entertained class action is binding on class members in any subsequent litigation." *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) (citing, *inter alia*, RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(e) (1982)). Collateral estoppel, known also as "issue preclusion", "prevents the parties' relitigation of an issue that was (a) raised, (b) litigated, and (c) actually decided by a judgment in their prior proceeding". *Prime Management Co. v. Steinegger*, 904 F.2d 811, 816 (2d Cir. 1990). To be bound by a prior judgment, a party in the subsequent litigation must have been a party to, or represented by a privy in, the prior action; otherwise, it would be a violation of due process to enforce the prior judgment against that party. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 & n.7 (1979).

We do not believe that any of the sub-groups of plaintiffs could fairly be characterized as a party to the Florida action; thus, the issues they present to us are not barred by collateral estoppel. As we have noted above, the Florida class of Haitian aliens had three requirements for membership:

> (a) current or future detention on cutters or at Guantanamo Bay;
>
> (b) interdiction "pursuant to the United States Interdiction Program", and
>
> (c) denial of first amendment and procedural rights (*i.e.*, the screening procedures).

Simply put, the plaintiffs here do not meet the second characteristic because they are not being interdicted "pursuant to the United States Interdiction Program"

that was before the eleventh circuit, thus they do not fit within the definition of the Florida class. The plaintiffs here have been or will be interdicted pursuant to a different interdiction program. The one at issue in *HRC v. Baker* was a program of preliminary screening before return; the program put in place by the Kennebunkport Order is one of summary return without screening. This is a change sufficient to avoid the class definition in *HRC v. Baker*.

Judge Johnson defined the New York class as "All Haitians who have been or will be 'screened in' ". This phrasing necessarily encompasses two subgroups of Haitians threatened by persecution: those who had arrived prior to the certification of the class on April 7, 1992, and those who arrived, or will arrive, thereafter. All of those class members who "will be", but have not yet been, screened in, are necessarily persons who will be interdicted pursuant to the new program put in place by the Kennebunkport Order. If interdicted at sea and summarily repatriated, those class members will be denied screening.

There is at least one other person who is also outside the scope of the Florida class, but who is nonetheless a plaintiff in this case. A. Iris Vilnor is "a Haitian being held in detention on Guantanamo who has been 'screened out' by the INS." Complaint ¶ 10, at 6, *HCC v. McNary*, No. CV-92-1258 (E.D.N.Y.). She purports to represent 8,000 other screened-out plaintiffs (the "Vilnor plaintiffs"). Although the plaintiffs in *HRC v. Baker* included screened-out Haitians, those plaintiffs were challenging the old program. Vilnor, and those she purports to represent, are challenging the new program, which was imposed under the Kennebunkport Order.

As to the Vilnor plaintiffs, the government claims that they have no interest in litigating the issues before us, because they have nothing to gain from a return to the old program. This argument, of course, is addressed to standing, not collateral estoppel, and in any event, the Vilnor plaintiffs do have standing because they are *not* on this motion asserting any right to an initial screening; rather, they are asserting a right, under § 243(h) of the INA and Article 33 of the Refugee Convention, not to be returned to Haiti. While screened-out before, this determination cannot be binding for all time, since political situations change. The Vilnor plaintiffs might well, upon a future interception, be found to have been threatened by persecution.

In sum, neither those plaintiffs who would be screened in, nor those plaintiffs who would be screened out but who are now being intercepted under the new interdiction program, are precluded by the *HRC v. Baker* litigation, as they were not members of the plaintiff class as defined in that case.

2. *Change in circumstances.*

Even if all of the requirements for issue preclusion are met, a court should nonetheless decline to give collateral estoppel effect to a prior judgment if there are "changes in facts essential to [the prior] judgment", *Montana v. United States*, 440 U.S. 147, 159 (1979), or if "a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws." RESTATEMENT (SECOND) OF JUDGMENTS § 28(2) (1982). We have accepted the view put forth in the Restatement's § 28(2), *Staten Island Rapid Transit*

Operating Auth. v. ICC, 718 F.2d 533, 543 (2d Cir. 1983), as have other courts, *e.g.*, *Kania v. Fordham*, 702 F.2d 475, 476 n.2 (4th Cir. 1983) ("Relitigation of an issue of public importance should not be precluded when there has been 'an intervening change in the applicable legal context.' "). Where pure, "unmixed question of law" are presented in successive actions, "preclusion may be inappropriate", for "[u]nreflective invocation of collateral estoppel * * * could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct * * * is critical." *Montana v. United States*, 440 U.S. at 162-63. *Accord Allen v. McCurry*, 449 U.S. 90, 95 n.7 (1980).

Especially where pure questions of law are presented, courts and commentators both have recognized that the interests of finality and judicial economy may be outweighed by other substantive policies, for in this circumstance "[t]he interests of courts and litigants alike can be protected adequately by the flexible principles of stare decisis." 18 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4425, at 244 (1981). *See also United States v. Stauffer Chem. Co.*, 454 U.S. 165, 177 (1984) (White, J., concurring) ("were consistency a compelling concern as between circuits, the decision of one circuit would bind the others even in litigation between two entirely different parties.")

As to those plaintiffs who are arguably members of the Florida class, we believe that the Kennebunkport Order represents "an intervening change in the applicable legal context", *see* RESTATEMENT (SECOND) OF JUDGMENTS § 28(2), which warrants "a new determination". *Id.* Since the dispositive question—whether § 243(h) of the INA applies to

conduct of the United States outside of our territorial waters—is one purely of law, few judicial resources would be saved by collaterally estopping these plaintiffs from litigating this issue, and the public importance of the issue merits full consideration on the merits, especially in light of the events that have occurred since the eleventh circuit decided *HRC v. Baker* and the Supreme Court denied *certiorari*.

After prevailing in the eleventh circuit, the Solicitor General of the United States opposed *certiorari* in *HRC v. Baker* by representing to the Supreme Court "that 'screened in' individuals would be brought to the United States so that they could file applications under the [INA] for asylum." *HCC I*, slip op. at 4382. *See also* Brief for United States in Opposition to *Certiorari* at 3, *HRC v. Baker*, *cert. denied*, 112 S. Ct. 1245 (1992) (No. 91-1292) (same). After that representation, the Supreme Court denied *certiorari* on February 24, 1992, Justice Blackmun dissenting. *See HRC v. Baker*, 112 S. Ct. 1245 (1992).

Only five days later, as we noted in *HCC I*, slip op. at 4382, the United States altered its policy in some respects, contravening the representation it had made to the Supreme Court. Then, scarcely two months later, the President issued the Kennebunkport Order, which made no pretense at all of adhering to the Solicitor General's prior representation to the Supreme Court. On the contrary, it permitted a policy, subsequently implemented, of *no* screening whatsoever.

A discretionary denial of review, of course, does not deprive a ruling of preclusive effect, *see*, *e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 28, comment a; but the circumstances surrounding the denial of *certiorari* in the Florida litigation weigh

significantly against granting that judgment preclusive effect in this action. The Supreme Court may well have seen no need to review *HRC v. Baker*, given the government's representation that no alien with a colorable claim of asylum would be turned away. But when the United States (a) resists Supreme Court review on a dramatic issue of such public import (a fact noted by three justices upon the denial of *certiorari*, *see* 112 S. Ct. at 1245-46), by representing that there will be screening of intercepted aliens followed by full consideration of asylum rights, (b) achieves the desired denial of *certiorari*, and then (c) embarks on a completely contrary policy, that is a change of the type that ought to permit an inferior court, unfettered by estoppel, to adjudicate the merits of a new case based on the new circumstances.

As will be seen, *infra*, we disagree with the eleventh circuit's conclusion that § 243(h) of the INA does not apply to return of refugees interdicted beyond the territorial waters of the United States. Since this creates an explicit "circuit split", the Supreme Court may see fit to grant *certiorari* on this case, *cf.* Sup. Ct. R. 10.1(a), and decide the issues which it declined to consider in *HRC v. Baker*. If it does, it will have the benefit of the carefully-considered, although contrary, views of two judicial circuits. The federal judicial hierarchy deserves this opportunity to consider this weighty issue on the merits, especially in light of the drastic changes in the legal context which have occurred since February 24, 1992.

Having concluded that we are not precluded in this case by the eleventh circuit's interpretation of § 243 (h)(1) in *HRC v. Baker*, we proceed to address the merits of that issue.

B. *Section 243(h)(1) of the INA.*

Before 1980, § 243(h) of the INA read as follows:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time he deems to be necessary for such reason.

In 1980 this section was replaced by a new § 243(h), consisting of two subparagraphs which were part of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. With that change, § 243(h)(1) reads thusly:

> The Attorney General shall not deport or return any alien * * * to a country if the Attorney General determines that such aliens's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1253(h)(1). This new statute makes the following textual changes: it strips the attorney general of the discretion formerly granted him under the old § 243(h) and makes his obligations under this new section mandatory; it applies now to "any alien", rather than "any alien within the United States"; and instead of authorizing the attorney general to "withhold deportation", it states that he "shall not deport or return" an alien found to have been threatened by persecution.

These amendments to this statute present us with two problems of construction and interpretation. First, we must determine whether Haitians intercepted in international waters fall within the scope

of "any alien" in § 243(h)(1). If so, we must turn to the second problem: whether intercepting Haitians in international waters and returning them to Haiti constitutes the "return" of an alien, conduct that would be impermissible under § 243(h)(1).

1. Congress has already resolved the first problem for us, for in § 101(a)(3) of the INA, 8 U.S.C. § 1101(a)(3), it has provided that, as used in the INA, "[t]he term 'alien' means any person not a citizen or national of the United States." The plain language of this provision makes clear that aliens are aliens, regardless of where they are located. Since the words of the statute are unambiguous, " 'judicial inquiry is complete.' " *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). In light of this congressional definition, the plaintiffs in this case, who are citizens of Haiti, not of the United States, are plainly designated by the term "any alien", used by congress in § 243(h)(1).

Since the plain language of § 243(h)(1) and § 101(a)(3) appears to resolve the first statutory problem before us, we may turn to other canons of construction only to determine whether there is a "clearly expressed legislative intention" contrary to that language, which would require us to question the virtually-conclusive presumption that congress meant what it said. *United States v. James*, 478 U.S. 597, 606 (1986). *But see INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) (only when the plain language leads to a "patent absurdity"); *Union Bank v. Wolas*, 112 S. Ct. 527, 534 (1991) (Scalia, J., concurring) (only to find "a 'scrivener's error' producing an absurd result"). The government nevertheless tenders numerous reasons—the presumption against extraterritorial application, an assertedly inconsistent provision in § 243(h)(2)(C), § 243's placement in part V of the INA, and other provisions of the INA which expressly limit their application to aliens "within the United States"—to support its argument that § 243(h)(1) does not apply to these plaintiffs. We reject all of these arguments, none of which is ufficient to overcome the plain language of § 243(h)(1).

First, the presumption that laws of the United States have no extraterritorial application has no relevance in the present context. That presumption is a canon of construction "whereby *unexpressed* congressional intent may be ascertained", *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949) (emphasis added), which "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991). But congress knew "how to place the high seas within the jurisdictional reach of a statute", *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989), and it did so here by making § 243(h)(1) apply to "any alien" without regard to location. Additionally, comity is of reduced concern here, as the Haitians are being intercepted in international (*i.e.*, non-sovereign) waters. We are thus not faced with the spectre of forum-shopping refugees coming into United States courts in order to enforce some right that courts in Haiti would not recognize; on the contrary, § 243(h)(1) may be invoked only in United States courts, and only against the United States government. Only when the United States itself acts extraterritorially does § 243(h)(1) have extraterritorial application. Absent proactive

government intervention of the sort presented here, § 243(h)(1)'s ban on "return" of aliens to their persecutors could not be invoked by persons located outside the borders of the United States.

Second, the government points us to § 243(h)(2)(C) of the INA, which directs that the provisions of § 243(h)(1) shall not apply if "there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." 8 U.S.C. § 1253(h)(2)(C). The government argues that the language "prior to the arrival of the alien in the United States" means that § 243(h)(1) cannot apply to these plaintiffs, who have not arrived in the United States. We disagree.

To accept the government's reading of the statute, we would, in effect, be reading the words "within the United States" back into § 243(h)(1), which would counter congress's plainly expressed intent to eliminate those limiting words in 1980. The Supreme Court only recently reminded us of "the canon of statutory construction requiring a change in language to be read, if possible, to have some effect, see, *e.g.*, *Brewster v. Gage*, 280 U.S. 327, 337 (1930); 2A N. Singer, Sutherland Statutory Construction § 46.06 (5th ed. 1992)." *American Nat'l Red Cross v. S.G.*, 60 U.S.L.W. 4631, 4635 (U.S. June 19, 1992). Our reading, on the other hand, gives full vitality to all portions of § 243(h), as actually written by congress. True, the "serious nonpolitical crime" exception in § 243(h)(2)(C) does not apply to an alien who has not arrived in the United States, but that seems to be precisely what congress meant to accomplish. Not only is that the way they worded the exception, but it also comports with common sense. The United

States would have a strong domestic interest in keeping alien criminals out of its territory (and out of its prisons), and a strong foreign policy interest in refraining from granting safe haven to nonpolitical criminals fleeing from other countries.

Before 1980, § 243(h) distinguished between two groups of aliens: those "within the United States", and all others. After 1980, § 243(h)(1) no longer recognized that distinction, although § 243(h)(2)(C) preserves it for the limited purposes of the "serious nonpolitical crime" exception. The government's reading would require us to rewrite § 243(h)(1) into its pre-1980 status, but we may not add terms or provisions where congress has omitted them, *see Gregory v. Ashcroft*, 111 S. Ct. 2395, 2404 (1991); *West Virginia Univ. Hosps., Inc. v. Casey*, 111 S. Ct. 1138, 1148 (1991), and this restraint is even more compelling when congress has specifically removed a term from a statute: "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded". *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting) (quoted with approval in *INS v. Cardoza-Fonseca*, 480 U.S. at 442-43). "To supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 250 (1926) (Brandeis, J.).

The third reason urged by the government for not reading the statute literally, is that § 243(h)(1) is located in Part V of the INA. This argument similarly fails. Part V of the INA deals primarily with deportation and adjustment of status. The eleventh circuit relied on this fact—almost exclusively—to conclude that "[t]he provisions of Part V of the INA

dealing with deportation only apply to aliens 'in the United States.'" *HRC v. Baker*, 953 F.2d at 1510 (citing, *inter alia*, 8 U.S.C. §§ 1251, 1253(a)). Putting aside the fact that it ignores the plain language of § 243(h), this argument ascribes entirely unwarranted weight to the location of the provision: of course, the provisions of Part V "dealing with deportation" must apply only to aliens "in the United States", since an alien must be "in" the "port" of a country in order to be "de-ported" from it. *See generally* 8 U.S.C. § 1251(a) ("Any alien * * * in the United States" may be deported if certain conditions are met); David A. Martin, *Major Issues in Immigration Law* 9-10 (Federal Judicial Center 1987).

The statute's location in Part V reflects its original placement there before 1980—when § 243(h) applied by its terms only to "deportation". Since 1980, however, § 243(h)(1) has applied to more than just "deportation"—it applies to "return" as well (the former is necessarily limited to aliens "in the United States", the latter applies to all aliens). Thus, § 243, which applies to all aliens, regardless of whereabouts, has broader application than most other portions of Part V, each of which is limited by its terms to aliens "in" or "within" the United States; but the fact that § 243 is surrounded by sections more limited in application has no bearing on the proper reading of § 243 itself. If anything, it has an effect opposite to what the government suggests: it tends to prove that if congress had meant to limit § 243(h)(1)'s scope to aliens "in the United States", it surely knew how to do that. "'"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely

in the disparate inclusion or exclusion."'" *INS v. Cardoza-Fonseca*, 480 U.S. at 432 (citations omitted).

Lastly, we reject the government's suggestion that since § 243(h) restricts actions of only the attorney general, the President might in any event assign the same "return" function to some other government official. Congress understood that the President's agent for dealing with immigration matters is the attorney general, *see* 8 U.S.C. § 1103(a); *cf. Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972), and we would find it difficult to believe that the proscription of § 243(h)(1)—returning an alien to his persecutors—was forbidden if done by the attorney general but permitted if done by some other arm of the executive branch.

In sum on this point, the district court erred in concluding that § 243(h)(1) does not apply to aliens outside the United States. By drawing its conclusion from its earlier right-to-counsel ruling, the district court failed to appreciate the differences in the plain language of the two statutes. The INA's right-to-counsel provision, 8 U.S.C. § 1362, applies to "the person concerned" in "any exclusion or deportation proceeding[]", whereas, as we have already noted, § 243(h)(1) applies by its terms to a much broader class of persons—all "aliens", no matter where located.

2. Having concluded that § 243(h)(1) applies to all "aliens", we must face the other textual problem posed by the statute: whether the government's interception and forcible repatriation of Haitian refugees constitutes a "return" of those refugees to their persecutors in violation of § 243(h)(1). We conclude that it does.

Section 243(h)(1) prohibits the government from both *deporting* and *returning* an alien. Virtually all prior litigation under this subsection has focused on the term "deport"; not until the executive's recent actions in "reaching out" to repatriate Haitians has litigation attention shifted to the term "return", which is nowhere defined in the INA. Since congress provided no special defintions, we must interpret § 243(h)(2) by "giving the 'words used' their 'ordinary meaning' ", *Moskal v. United States*, 111 S. Ct. 461, 465 (1990) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)). The rule is no different for the INA: we " 'assume "that the legislative purpose is expressed by the ordinary meaning of the words used." ' " *INS v. Phinpathya*, 464 U.S. 183, 189 (1984) (citations omitted).

Congress directed that the "Attorney General shall not * * * return any alien to a country" that would persecute the alien. When used, as here, in its transitive mode, the word "return" means "to bring, send, or put (a person or thing) back to or in a former position". *Webster's Third New International Dictionary* 1941 (1971). Here, congress has amplified the meaning of "return" by adding after the word "return", the prepositional phrase "to a country [where he would be persecuted]"; significantly, congress made no mention of where the alien (who may be anywhere, within or without the United States) must be returned "from". Of parallel significance, the Kennebunkport Order itself directs the Coast Guard to "return the vessel and its passengers *to* the country from which it came". (emphasis added). As we do with congress, we presume that the President of the United States uses words with their "ordinary meaning"; thus, when the "return" directed by the President is *to* a persecuting country, it is exactly the kind of "return" that is prohibited by § 243(h)(1) of the INA.

Since the plain language of § 243(h) demonstrates that what is important is the place "to" which, not "from" which, the refugee is returned, and since § 243(h)(1) by its terms (a) applies to all "aliens" regardless of their location, and (b) prohibits their "return * * * to a country" where they would likely be persecuted, we conclude that the executive's action of reaching out into international waters, intercepting Haitian refugees, and returning them without determining whether the return is to their persecutors, violates § 243(h)(1) of the Immigration and Nationality Act.

The government does not offer a contrary view of the term "return" in § 243(h)(1); rather, it argues that the 1980 amendment to § 243(h) merely "makes the language read like Article 33" which, the government assures us, prohibits the "return" only of refugees who have entered the territory of the contracting state. Thus, we must turn our attention to the government's reading of Article 33.

3. Article 33 of the Refugee Convention, which is entitled "Prohibition of expulsion or return ('refoulement')", reads:

> 1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefits of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a

> danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

United Nations Convention relating to the Status of Refugees, 189 U.N.T.S. 150, 176 (1954). Although the United States was not a party to the original Refugee Convention, the provisions of that Convention were nonetheless ratified by the United States when it acceded to the 1967 Protocol relating to the Status of Refugees ("Protocol"). 19 U.S.T. 6223, 6225.

The Supreme Court has recognized "that one of Congress' primary purposes [in passing the Refugee Act of 1980] was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, * * * to which the United States acceded in 1968." *INS v. Cardoza-Fonseca*, 480 U.S. at 436-37. *See also INS v. Doherty*, 112 S. Ct. 719, 729 (1992) (Scalia, J., concurring) ("In 1980, Congress removed all doubt concerning the matter" of whether the Attorney General "honored the dictates" of Article 33.1); *INS v. Stevic*, 467 U.S. 407, 421 (1984) (the Refugee Act of 1980 amended § 243(h), "basically conforming it to the language of Article 33 of the United Nations Protocol.") *HCC I*, slip op. at 4409 (same). *Cf. United States Dept. of State v. Ray*, 112 S. Ct. 541, 543 n.1 (1991) (footnote).

In construing treaties, we use principles analogous to those that guide us in the task of construing statutes. *Cf. United States v. Stuart*, 489 U.S. 353, 371 (1989) (Scalia, J., concurring) (if "the Treaty's language resolves the issue presented, there is no

necessity of looking further to discover 'the intent of the Treaty parties' "). Rather than having evolved from a judicial common law, however, principles of treaty construction are themselves codified, in Article 31 of the Vienna Convention on the Law of Treaties (also known as "the Treaty on Treaties"), 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969), *entered into force* Jan. 27, 1980. Although the United States has not ratified the Vienna Convention, it is a signatory. We have previously applied the Vienna Convention in interpreting treaties, *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 36 (2d Cir. 1975) (Warsaw Convention), *cert. denied*, 429 U.S. 690 (1976), as has the United States Department of State. *See* Letter from Edwin D. Williamson, Legal Adviser, Department of State, to Timothy E. Flanigan, Acting Assistant Attorney General 2 (Dec. 11, 1991) (regarding *HRC v. Baker*).

As with statutes, treaties are to be construed first with reference to their terms' "ordinary meaning * * * in their context", and "in light of their object and purpose." Vienna Convention, art. 31(1). The plain meaning of treaty terms controls " 'unless "application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories." ' " *United States v. Stuart*, 489 U.S. at 365-66 (citations omitted). To stray from clear treaty language, there must be "extraordinarily strong contrary evidence". *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982). According to Article 32 of the Vienna Convention, "supplementary means of interpretation", which consist primarily of the preparatory and conclusory circumstances of a treaty (the international equivalent of legislative history) are to

be turned to only as a last resort, and then only if the primary tools of interpretation enumerated in Article 31 of the Vienna Convention "leave[] the meaning ambiguous or obscure" or lead to a "manifestly absurd or unreasonable result."

The plain language of Article 33.1 of the Refugee Convention leads us to conclude that, just as with § 243(h)(1), the word "return" means "return", without regard to where the refugee is to be returned *from*, and, just as with § 243(h)(1), what *is* important under Article 33.1 is where the refugee is to be returned *to*. The Protocol's definition of "refugee" is extremely persuasive on this point. Under the Protocol, a "refugee" is "any person who * * * owing to a well-founded fear of being persecuted * * * is outside the country of his nationality". Thus, a "refugee" under the Protocol, just as with "any alien" under § 243(h)(1) of the INA, is defined not with regard to his current location but with regard to his past location.

Article 33.1's prohibition against "return" plainly applies to *all* refugees, regardless of location. This reading is borne out by the language used in other articles of the Refugee Convention that have a more limiting effect on the term "refugee". *See, e.g.*, Article 4 ("refugees within their territories"); Article 15 ("refugees lawfully staying in their territory"); Article 17.1 (same); Article 18 ("refugee lawfully in their territory"); Article 19.1 ("refugees lawfully staying in their territory"); Article 21 (same); Article 23 (same); Article 24.1 (same); Article 26 ("refugees lawfully in its territory"); Article 27 ("refugee in their territory"); Article 28 ("refugees lawfully staying in their territory"); Article 31.1 (refugees who "enter or are present in their territory

without authorization"); Article 32.1 ("refugee lawfully in their territory").

The government's position, that Article 33.1 applies only to refugees who have entered the territory of the contracting state, is therefore untenable in view of the plain language of that section. Had the parties to the Refugee Convention meant to limit its application in that way, we would expect a wording of that section in line with, for instance, Article 4 ("refugees within their territories"). But the contracting states did not so limit Article 33.1; instead, the term "a refugee" in Article 33.1 encompasses all "refugees". *Accord* Offices of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* 9 (1979) ("A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined.").

This reading of Article 33.1 is further supported by the "object and purpose" not only of that article, but also of the Refugee Convention as a whole. It is clear that the purpose of Article 33.1 is to prevent all "refugees", "in any manner whatsoever", from being put into the hands of those who would persecute them. One of the considerations stated in the Preamble to the Convention is that the United Nations has "endeavoured to assure refugees the widest possible exercise of * * * fundamental rights and freedoms." The government's offered reading of Article 33.1, however, would narrow the exercise of those freedoms, since refugees in transit, but not present in a sovereign area, could freely be returned to their persecutors. This would hardly provide refugees

with "the widest possible exercise" of fundamental human rights, and would indeed render Article 33.1 "a cruel hoax".

The Protocol, moreover, indicates that Article 33's *nonrefoulement* obligation must be enforced as written. Although contracting states may make "reservations" as to the terms of other articles in the Refugee Convention, Article 33 is one of the few articles which may not be tampered with by the contracting states. *See* Protocol, art. VII.1. Additionally, Article I.3 of the Protocol provides that the "Protocol shall be applied by the States Parties hereto without any geographic limitation". In short, were we to accede to the government's offered reading of Article 33.1, we would be endorsing a reading so limited as to be fundamentally contrary to the Protocol's, and to the Refugee Convention's, "object and purpose" as expressed by the plain language.

The government nonetheless offers us numerous reasons to stray from the straight-and-narrow path of plain language. First, it argues that the inclusion of the French term "*refouler*", placed in parentheses after the word "return" in Article 33.1, "connotes ejection of an alien from within the territory of the Contracting State." Brief for United States at 40. In support of this argument, the government cites from *Cassell's French Dictionary* one of the many meanings of "*refouler*": "expel (aliens)"; and the government contends that a refugee cannot be expelled if he is not yet in a country.

Plaintiffs offer a somewhat different interpretation of "*refouler*" from the *Dictionnaire Larousse*, which suggests that it implies repelling or driving back an alien who has not yet entered. Similar meanings of "*refouler*" are found in *Cassell's*, the government's

source. As the plaintiffs point out, the government's strained reading of Article 33.1 would forbid a state to "expel or expel" an alien. Recognizing this anomaly, the government responds by suggesting that "expel or return ('*refouler*')" is to be read as a "unitary whole". However, the French text of the Refugee Convention (which, according to Article 46 of the Refugee Convention, is "equally authentic" to the English text) undercuts the government's reading; the French text ("Aucun des Etats Contractants n'expulsera ou ne refoulera"), by using "ou", meaning "or", conclusively shows that expel (*expulsera*) and return (*refoulera*) are to be read disjunctively, not as a "unitary whole".

The government, however, suggests that the plaintiffs' reading of "*refouler*" renders the word "expel" superfluous, since "return" would then encompass all modes of return, by expulsion or otherwise. The government may actually be correct in this assumption, but the contracting states had good reason to specifically include "expel", for under the Refugee Convention, it is a term of art. Article 32, which is entitled "Expulsion", forbids a contracting state to "expel a refugee lawfully in their territory". If Article 33.1 had not contained the word "expel", it might not have been as clear that it applied to that specific manner of "return" in addition to other manners. *Accord* Guy S. Goodwin-Gill, *The Refugee in International Law* 69 (1983) ("*Refoulement* is thus to be distinguished from expulsion or deportation, the more formal process whereby a lawfully resident alien may be required to leave a state, or be forcibly ejected therefrom.").

The second reason that we should stray from the plain language of Article 33.1, says the government,

is that the President has interpreted the article as not applying to "persons located outside the territory of the United States", Exec. Order 12,807, 57 Fed. Reg. at 23,133, and his interpretation, says the government, "is entitled to great weight." *See, e.g., Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. at 185. However, it is by no means conclusive. *Id.* at 184.

In this case, the executive branch's interpretation of Article 33.1 appears to be much closer to a litigating posture than it is to an authoritative interpretation, and in any event it diverges markedly from the clear language of the Refugee Convention. Moreover, "it is not clear here precisely what position of the [executive] this court ought to defer to", *Lewis v. Grinker*, No. 91-6176, slip op. 1475, 1507 (2d Cir. Jan. 31, 1992), since the executive has previously read Article 33.1 in a contrary fashion. In a December 11, 1991, letter to Acting Assistant Attorney General Timothy E. Flanigan, which was "Re: *Haitian Refugee Center, Inc. v. Baker*", the Legal Adviser of the Department of State wrote:

> Dear Tim:
>
> I am writing to provide you with the formal opinion of the Department of State on the question whether the *non-refoulement* obligation of Article 33 of the 1951 U.N. Convention Relating to the Status of Refugees ("the Refugee Convention") imposes obligations on the United States with respect to refugees outside United States territory. We have previously and publicly taken the position that the obligation applies only to persons within the territory of a Contracting State. This remains our firm view. For the reasons indicated below, the Department respectfully requests that you reconsider and withdraw the apparently contrary legal conclusion reflected in the opinion of the Office of Legal Counsel of August 11, 1981.

Acting Assistant Attorney General Flanigan concurred in the Department of State's request in a letter sent the next day, although that letter seemed to rely more extensively on the fact that, in the attorney general's view, the Protocol was not self-executing. What *is* clear from this exchange of letters is that the attorney general, at least from August 11, 1981, until *Haitian Refugee Center v. Gracey*, 600 F. Supp. 1396 (D.D.C. 1985), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987), took the position that Article 33.1's *nonrefoulement* provisions did apply outside the territory of the United States. *See* 5 Op. Off. Legal Counsel 242, 248 (1981) ("Individuals [intercepted on the high seas] who claim that they will be presecuted * * * must be given an opportunity to substantiate their claims [under Article 33.1]."). Given the facts that the executive branch has taken two contrary positions on Article 33.1's prohibition of *refoulement*, and that the second interpretation was "the sort of *post hoc* litigation posture that is entitled to no deference", *Lewis v. Grinker*, slip op. at 1507, we would not feel justified in viewing the second interpretation as the sort of "extraordinarily strong contrary evidence" needed to nullify the plain language of Article 33.1.

Third, the government argues that its reading of Article 33.1 is actually *supported* by the text of Article 33, and of the Convention, as a whole. We reject this contention as well. Article 33.2 carves out an exception to Article 33.1, much like § 243(h)(2)(C) of the INA does with § 243(h)(1). However, it does

not follow that all refugees covered by Article 33.1 are potentially subject to the Article 33.2 exception; on the contrary, the latter section is limited (for good reason of national security) to refugees "in" a certain country. Moreover, the government's argument that the geographical limits that are placed on "refugees" in other areas of the Convention tacitly limit the use of "refugee" in Article 33.1 actually supports a contrary reading, as we have noted, *supra*. With the usual apologies to Cicero, Article 33.1's silence on geographic limitation shouts loudly its proper meaning. *Cf. Greenberg v. Board of Governors*, No. 91-4200, slip op. 4621, 4634 (2d Cir. June 19, 1992).

The government's fourth and final assault on the clear language of the Refugee Convention comes in the form of what Justice Scalia recently called "that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction, legislative history." *United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2111 (1992) (Scalia, J., concurring). In this regard, the government relies on the negotiating history of the Refugee Convention, as well as the circumstances of the United States' accession to the Protocol.

The government's argument is essentially the same argument put forth by Judge Edwards in his thoughtful and scholarly concurrence in *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 839-41 (D.C. Cir. 1987). There, Judge Edwards relied *exclusively* on the negotiating history of the Refugee Convention to conclude that "Article 33 in and of itself provides no rights to aliens outside a host country's borders." *Id.* at 840. The linchpin of the government's (and of Judge Edwards') argument is the statement of the Netherlands' representative at the final reading of the

draft Refugee Convention, which appears *id.* at 840 n.133. For convenience, we reproduce it below:

> Baron van BOETZELAER (Netherlands) recalled that at the first reading the Swiss representative had expressed the opinion that the word "expulsion" related to a refugee already admitted into a country, whereas the word "return" (*"refoulement"*) related to a refugee already within the territory but not yet resident there. According to that interpretation, article 28 would not have involved any obligations in the possible case of mass migrations across frontiers or of attempted mass migrations.
>
> He wished to revert to that point, because the Netherlands Government attached very great importance to the scope of the provision now contained in article 33. The Netherlands could not accept any legal obligations in respect of large groups of refugees seeking access to its territory.
>
> At the first reading the representatives of Belgium, the Federal Republic of Germany, Italy, the Netherlands and Sweden had supported the Swiss interpretation. From conversations he had since had with other representatives, he had gathered that the general consensus of opinion was in favour of the Swiss interpretation.
>
> In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33.
>
> There being no objection, the PRESIDENT [of the Conference] *ruled* that the interpretation

given by the Netherlands representative should be placed on record.

Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Thirty-fifth Meeting, U.N. Doc. A/CONF. 2/SR. 35, at 21 (July 25, 1951) (emphasis in original).

This presents the biggest possible pitfall in the use of legislative history: what do we do when the legislative history is ambiguous? Although Judge Edwards concluded that this legislative history was an "agree[ment]," *see Haitian Refugee Center v. Gracey*, 809 F.2d at 840, the above-quoted passage is ambiguous on even this point. The Netherlands' representative asked that it be placed on record "that the Conference was in agreement" with his interpretation, but the President ruled only that "the interpretation given by the Netherlands representative should be placed on record." Judge Edwards' reading of this passage is a fair one; it would, however, be an equally-fair reading to see this passage as simply recording the views of a dissenting member. This is the view of *amicus* Office of the United Nations High Commissiner for Refugees, whose *Handbook on Procedure and Criteria for Determining Refugee Status* "provides significant guidance in construing the Protocol". *INS v. Cardoza-Fonseca*, 480 U.S. at 439 n.22.

Moreover, the concern of the Netherlands' representative is that his country "could not accept any legal obligations in respect of large groups of refugees seeking access to its territory." He may well have meant only that his country would be free to close its borders in the face of a threat of mass migration, leaving fleeing refugees the opportunity to make their way (by land or air) to some other haven. But his

concern not to accept "any legal obligations", even if shared by others considering the treaty, would not have meant that his country could go beyond the negative act of closing its border and take the affirmative steps of seizing refugees approaching the border and forcibly carrying them back to the custody of those from whom they are fleeing.

Thus, even if we were to turn statutory construction on its head, and look to the words of the statute only when the legislative history is unclear, we would have to draw the same conclusion: Article 33.1 applies to all refugees, just as § 243(h)(1) of the INA applies to all aliens, no matter where found.

C. *Article II Powers and Other Justifications for the Kennebunkport Order.*

Finally, the government offers numerous reasons why the summary return of Haitians is authorized by law. We find none of these arguments sufficient to overcome the will of Congress as expressed in § 243(h)(1) of the INA, for "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely on upon his own constitutional powers minus any constitutional power of Congress over the matter". *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 637 (Jackson J., concurring).

The government suggests that both the President's constitutional position as "Commander in Chief of the Army and Navy of the United States", U.S. Const. art. II, § 2, cl. 1, and his "inherent authority as ' "the sole organ of the nation in its external relations" ' ", Brief for United States at 27 (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319

(1936), in turn quoting Annals of Congress, 6th Cong., col. 613 (Mar. 7, 1899)), justify the Kennebunkport Order. We disagree.

The Supreme Court said, in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950), that "[t]he exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." But the reason for that rule is absent here, for this case does not deal with the sovereign right "to turn back from our gates any alien or class of aliens." *Id.* at 550 (Jackson, J., dissenting). To the contrary, when seized, these aliens were far from, and by no means necessarily heading for, our gates.

Similarly, we reject the government's arguments that §§ 212(f) and 215(a)(1) of the INA, which allow the President to "suspend the entry of all aliens or any class of aliens" and to place such "reasonable rules, regulations * * * limitations and exceptions" on the entry of aliens as he deems appropriate, also allow him to order the summary return to their persecutors of aliens intercepted on the high seas. The President's power to regulate "entry" into the United States is not questioned on this appeal. Even though the executive's actions have the practical effect of prohibiting some Haitians' entry into the United States, they also have the effect of prohibiting the Haitians from gaining entry into the Bahamas, Jamaica, Cuba, Mexico, the Cayman Islands, or any other country in which they might seek safe haven. By enforcing the INA's prohibition against forcible return of refugees, we leave unimpaired the President's authority to regulate entry into this country.

The government says that this is "an absurd result", since, under this reading, "the President could authorize the Coast Guard to block the path of Haitian vessels sailing toward Miami and force them back to sea without regard for their safety, but could not return them to land." Brief for United States at 30. We do not see the absurdity. This argument fails because it embraces two unwarranted assumptions—one express, the other not. While some intercepted Haitians may in fact be heading for Miami, some may also be heading toward other nations. The government's actions prevent the Haitians from seeking asylum in *any* country. Also, the unstated premise—that returning these Haitians to their persecutors is somehow "in regard for their safety"—is itself absurd.

Likewise, while the President is entitled to lead the country's external relations, he apparently did not view the Kennebunkport Order as addressing a foreign policy concern; on the contrary, the executive order specifically states that it was "intended only to improve the internal management of the Executive Branch." Exec. Order 12,807, 57 Fed. Reg. at 23,134. In any event, congress, wielding its "complete", "plenary" legislative power over immigration matters, *see Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909); *Boutelier v. INS*, 387 U.S. 118, 123 (1967), has spoken directly to the question at issue so that "[t]his is a job for the Nation's lawmakers, not for its military authorities." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 587. Similarly, we reject any suggestion that the Kennebunkport Order was issued "pursuant to an express or implied authorization of Congress", *id.* at 635 (Jackson, J., concurring), for we can hardly infer congress's per-

mission for the executive to do what it *expressly* forbade him from doing by § 243(h)(1) of the INA.

The government also argues that the Kennebunkport Order draws on the authority that congress gave to the Coast Guard to compel compliance with the laws of the United States on the high seas, including the power to use "all necessary force to compel compliance." 14 U.S.C. § 89(a). According to the government, the Haitians are somehow violating the INA's prohibition on illegal entry while afloat on the international waters of the Windward Passage. This argument is perplexing at best, and in any event provides no ground for sustaining the current interdiction program.

Lastly, although not raised in so many words, there is an undercurrent in the government's brief to the effect that this case presents a "political question" which is beyond the scope of judicial decisionmaking. We strongly disagree, for this case involves a determination of whether the current interdiction program itself (a creation of an executive order and thus of law, *see Acevedo v. Nassau County, NY*, 500 F.2d 1078, 1084 n.7 (2d. Cir. 1974)) is consistent with a federal statute. As our discussion above amply illustrates, there exists no "lack of judicially discoverable and manageable standards" to apply. *See Baker v. Carr*, 369 U.S. 186, 217 (1962). "The federal courts may review a case such as this one to insure that 'the executive departments abide by the legislatively mandated procedures.'" *Haitian Refugee Center v. Gracey*, 809 F.2d at 838 n.116 (Edwards, J., concurring) (quoting *International Union of Bricklayers v. Meese*, 761 F.2d 798, 801 (D.C. Cir. 1985)).

CONCLUSION

The plain language of § 243(h)(1) of the Immigration and Nationality Act clearly states that the United States may not return aliens to their persecutors, no matter where in the world those actions are taken. In view of this, plaintiffs' arguments regarding the self-executing nature of Article 33.1 of the Refugee Convention are largely academic, since § 243(h)(1) provides coextensive protection.

In light of our conclusion that § 243(h)(1) prohibits the actions at issue, we need not address the plaintiffs' remaining arguments in favor of reversal. The order of the district court is reversed, and the case is remanded to the district court with instructions to enter an injunction prohibiting the defendants from returning to Haiti any interdicted Haitian whose life or freedom would be threatened on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.

Reversed and remanded with instructions. The mandate shall issue forthwith.

JON O. NEWMAN, *Circuit Judge*, with whom Judge Pratt joins, concurring

I concur in Judge Pratt's opinion and add these few words primarily to clarify what I believe is the significance to the collateral estoppel issue of the Government's shift from the position it took when it successfully opposed certiorari in *Haitian Refugee Center v. Baker*, 949 F.2d 1109 (11th Cir. 1991) ("HRC"), to the position it now takes with regard to interdiction. The Government persuaded the Supreme Court not to review the Eleventh Circuit's decision by assuring the Court that it would screen Haitian refugees and bring to this country those who qualified for asylum. Having made that representation to insulate from review a decision that the screening policy was lawful, the Government now asks us to apply collateral estoppel to a lawsuit challenging the new policy of returning Haitians without screening—a policy Judge Pratt and I believe is unlawful. If we were to accede to that argument, we would be letting the Government keep the Eleventh Circuit ruling from the Supreme Court on a promise that is no longer being honored and then let the Government keep our decision from the Supreme Court by asserting that we had correctly applied collateral estoppel. That would be gamemanship of the rankest sort, especially inappropriate in a lawsuit affecting people's lives.

Judge Walker in dissent, misperceives the point of our discussion of the Government's change of position from what it asserted in opposition to certiorari in *Baker*. First, he points out that the plaintiffs are not entitled to certiorari. That is true, but entirely beside the point. We are not suggesting that the HRC plaintiffs were entitled to have the Supreme Court review

the Eleventh Circuit's decision. We are suggesting that the Government cannot fend off such review on a promise to pursue one policy, then abandon that policy, and then use that unreviewed decision, insulated from review by a representation no longer being honored, to obtain a collateral estoppel ruling from this Court as to the lawfulness of the new policy. I do not question the Government's right to change its mind. But I do question its right to secure a litigating benefit from the position it previously asserted and then, after it has abandoned that position, to secure another litigating benefit in this Court.

Judge Walker also suggests that what the plaintiffs are really arguing is that the Supreme Court should apply some sort of equity argument to grant review of the collateral estoppel ruling he believes we should make in this case. But that is not at all what the plaintiffs are arguing. They are not so easily gulled. They understand that the issue is not whether some generous certiorari review should be applied to our collateral estoppel ruling. Instead, the issue is whether we should apply collateral estoppel in the first place. We should not do so, especially since we disagree on the merits with the Eleventh Circuit and since the Government has now abandoned the promise it made to the Supreme Court in fending off review of that Circuit's ruling.

With respect to the merits, I wish to add only one point. Judge Walker maintains that section 243(h) is confined to the territorial limits of the United States because its reach is coextensive with section 208(a), which establishes asylum procedures for "an alien physically present in the United States or at a land border or port of entry," 11 U.S.C. sec. 1158(a) (1988). I can readily agree that the two provisions are co-extensive in most of their applications. When

Congress drafted both sections 208(a) and 243(h), it was most likely thinking primarily of those who would arrive at our shores seeking asylum. The idea that our country would seize aliens in foreign lands or on the high seas and return them to their persecutors was probably not in the contemplation of most legislators. But the language of section 243(h), like the language of the UN Protocol that it implements, goes one step beyond the scope of section 208(a): It forbids our country from laying hands on an alien anywhere in the world and forcibly returning him to a country in which he faces persecution.

Unlike section 243(h), the asylum procedure of section 208(a) is explicitly limited to those in our territory. But asylum procedures for entry of an alien do not operate in the same manner as the prohibition on returning an alien to face persecution. Asylum is a discretionary decision of the Attorney General. No alien, even one who satisfies the standard of "refugee," has a right to asylum, or a right to enter the United States. *See Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 428 n.5 (1987) ("It is important to note that the Attorney General is *not required* to grant asylum to everyone who meets the definition of refugee.") (emphasis in original). If denied asylum, he may not enter; he may go elsewhere, or, in an extreme case, languish at our border. *Cf. Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (excluded alien detained at Ellis Island). But the command of section 243(h) is absolute: the alien shall not be returned to face persecution. That command cannot be circumvented by seizing the alien as he approaches our border, whether by land or by sea, and returning him to his persecutors.

WALKER, *Circuit Judge*, dissenting:

The plight of the Haitian plaintiffs in this case, whose desperation forces them onto the ocean in unseaworthy boats, escapes no one who considers the issues presently before us. I believe, however, that plaintiffs have already had a day in court on these issues and are collaterally estopped from seeking another. Even if they were not, plaintiffs cannot succeed in their challenge to the government's interdiction and repatriation policy implemented pursuant to a May 23, 1992 Executive Order. *See* Exec. Order 12,807, 57 Fed. Reg. 23,133 (1992) (the "May 23, 1992 Order"). Plaintiffs rely on § 243(h) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1253(h) (Supp. 1992), and Article 33 of the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (1954) ("Article 33"). These provisions, however, bind the United States only with respect to aliens who have physically reached our territory. They grant no rights to plaintiffs in this case who have been or will be interdicted on the high seas. Whatever the merits of the policy of interdiction and return, as part of the United States response to the foreign policy crisis precipitated by the fall of the Haitian government in September, 1991, and the ensuing mass migration of Haitians in boats, I sit not as a policymaker but as a judge. I believe that the law does not support plaintiffs' claim. I respectfully dissent from the opinion of the majority granting plaintiffs' request for injunctive relief.

I. *Collateral Estoppel*

The first question on this appeal is whether *Haitian Refugee Center v. Baker* collaterally estopps [*sic*]

plaintiffs from raising certain issues. *See Haitian Refugee Center, Inc. v. Baker*, 789 F. Supp. 1552 (S.D. Fla. 1991), *rev'd* 949 F.2d 1109, (11th Cir. 1991) (per curiam) (*"HRC v. Baker I"*), *on remand*, 789 F. Supp. 1579 (S.D. Fla. 1991), *rev'd*, 953 F.2d 1498 (11th Cir. 1992) (*"HRC v. Baker II"*), *cert. denied*, 112 S. Ct. 1245 (1992). "Under the doctrine of collateral estoppel . . . the judgment in [a] prior suit [between the parties or their privies] precludes relitigation of issues actually litigated and necessary to the outcome of the first action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). "Once a party has fought out a matter in litigation with another party, he cannot later renew that duel." *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 598 (1948).

Collateral estoppel applies to class actions. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984). Indeed, the important judicial interests in consistency, finality and economy that underlie the doctrine, *see Parklane Hoisery*, 439 U.S. at 326; 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4416 at 138-39 (1981) ("Wright & Miller"), apply with particular force in the class action setting. "The policy behind the class action device is, of course, to facilitate the final determination of numerous claims in one suit. This policy is not furthered by allowing subsequent collateral attacks by class members." *Garcia v. Board of Ed., Sch. Dist. No. 1*, 573 F.2d 676, 679 (10th Cir. 1978). Moreover, the government may well have relied on *HRC v. Baker* in instituting the major policy initiative set forth in the May 23, 1992 Order. This further accentuates the need for consistency and finality.

A. *Plaintiffs are collaterally estopped.*

Collateral estoppel "prevents the parties' relitigation of an issue that was (a) raised, (b) litigated, and (c) actually decided by a judgment in their prior proceeding." *Prime Management Co., Inc. v. Steinegger*, 904 F.2d 811, 816 (2d Cir. 1990). The *HRC v. Baker* judgment meets all three criteria. In *HRC v. Baker*, as in the current case, a class of Haitians sued officials of the United States government which, pursuant to Executive Order 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1991), *reprinted in* 8 U.S.C.A. § 1182, was "screening" interdictees to determine their refugee status. The *HRC v. Baker* plaintiffs claimed that the government's procedures did not accord them the full screening rights to which they were entitled under law. Pursuant to this claim, they argued that INA § 243(h) extends extraterritorially, Article 33 is self-executing, and that the Administrative Procedure Act accords them judicial review. The Eleventh Circuit, in upholding the government's limited screening procedures, decided each of these issues in the government's favor. *See HRC v. Baker* I, 949 F.2d at 1110; *HRC v. Baker* II, 953 F.2d at 1505-1506, 1509-10. These issues, which are present in the current case, were therefore "raised," "litigated" and "actually decided" in *HRC v. Baker*, and collateral estoppel should apply. *See Prime Management Co.*, 904 F.2d at 816. My colleagues, however, do not accept this position and I address each of their concerns in turn.

B. *Is the present class distinct from the* HRC v. Baker *Class?*

To begin with, the majority concludes that the two classes are different: "We do not believe that any of the sub-groups of plaintiffs could fairly be charac-

terized as a party to the Florida action; thus, the issue they present to us are not barred by collateral estoppel." Majority Op. at 11-12. I do not agree.

The *HRC v. Baker* class, as certified, consisted of:

> all Haitian aliens who are currently detained or who in the future will be detained on U.S. Coast Guard Cutters or at Guantanamo Naval Base who were interdicted on the high seas pursuant to the United States Interdiction Program and who are being denied First Amendment and procedural rights.

In the present case, the district court certified a class of "all Haitian citizens who have been or will be screened in." Since, under the interdiction policy, a plaintiff must be detained before he or she is screened in, it follows that the class of all those "who have been or will be screened in" is wholly contained within the class of all those "who are currently detained or will in the future be detained." The present class thus fits neatly within the *HRC v. Baker* class.

The majority, however, focuses on the terms "United States Interdiction Program." The panel states that the present plaintiffs "have been or will be interdicted pursuant to a different interdiction program. The one at issue in *HRC v. Baker* was a program of preliminary screening before return; the program put in place by the Kennebunkport Order is one of summary return without screening." The majority summarily concludes that "[t]his is a change sufficient to avoid the class definition in *HRC v. Baker*." Majority Op. at 12.

I cannot accept this artificial distinction. To begin with the obvious, it seems to me that the terms "United States Interdiction Program" refer to the

policy under which plaintiffs were interdicted and not the screening policy to which they were later subject. The term "interdiction program," as it is used elsewhere in the *HRC v. Baker* plaintiffs' complaint, is consistent with this reading. *See* Second Amended Complaint, *HRC v. Baker*, 789 F. Supp. 1552 (No. 91-2653-Civ), ¶ 2 ("Under an 'interdiction program,' the Coast Guard and the Immigration and Naturalization Service ('INS') intercept vessels on the high seas believed to be carrying Haitian aliens, many of whom meet the standard for political asylum and who seek refuge in our country."). Moreover, the majority neglects to mention that the two Executive Orders, which purportedly create two entirely separate programs, were issued pursuant to a single Proclamation dated September 29, 1981 and entitled "High Seas Interdiction of Illegal Aliens." Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981), *reprinted in* 8 U.S.C.A. § 1182 (West Supp. 1992). I read "United States Interdiction Program" to refer to the unitary program undertaken pursuant to Proclamation 4865. The *HRC v. Baker* complaint bears out this reading. *See* Second Amended Complaint, *HRC v. Baker*, 789 F. Supp. 1552 (No. 91-2653-Civ), ¶ 32 ("On September 29, 1981 the President issued Proclamation 4865 . . . which announced a program of 'interdiction: on the high seas of vessels transporting aliens.' "). The government's interdiction policy, which has continued unabated both before and after the May 23, 1992 Order, thus constitutes one program, not two.

Even if I could distinguish between a pre- and a post-May 23, 1992 "United States Interdiction Program," I would not find this distinction "sufficient to avoid the class definition in *HRC v. Baker*." Majority Op. at 12. Where the parties are in all material

respects the same and stand in an identical position vis-a-vis the issues, a purely formal distinction in the naming of the class will not enable a party to avoid issue reclusion. "Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal. As stated in *Chicago, R.I. & P. Ry. Co. v. Shendel*, 270 U.S. 611, 620 (1926), 'Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different . . . and parties nominally different may be, in legal effect, the same.'" *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402 (1940); *see also St. Louis Typographical Union v. Herald Company*, 402 F.2d 553, 556 (8th Cir. 1968). In another formulation of this principle, it has been stated that a party is "privy" to another, and hence bound by issue preclusion, if he or she is "so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved." *Jefferson School of Social Science v. Subversive Activities Control Bd.*, 331 F.2d 76, 83 (D.C. Cir. 1963) (citing cases); *see also Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 301 (7th Cir. 1985); *Gill and Duffus Serv., Inc. v. A.M. Nural Islam*, 675 F.2d 404, 405 n.3 (D.C. Cir. 1982); *United States v. Truckee-Carson Irrigation Dist.*, 649 F.2d 1286, 1303 (9th Cir. 1982); *Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F.2d 84, 95 & n.38 (5th Cir. 1977), *cert. denied*, 434 U.S. 832 (1977).

These principles require issue preclusion in the present case. The issues before us—the scope of INA § 243(h); the self-executing nature of Article 33; and judicial review under the APA—are identical to those before the *HRC v. Baker* court. Moreover, as a practical matter, the only asserted difference between the classes is that the *HRC v. Baker* class received some minimal screening rights prior to return, whereas the current plaintiffs receive none. The issues with which we are concerned, however, do not in any way turn on the existence or non-existence of a minimal screening. Nor does the minimal screening granted the *HRC v. Baker* plaintiffs have any bearing on the parties' incentive to litigate the issues. Thus, both classes stand in precisely the same legal position and assert the same legal interests with respect to the issues involved. Whether or not the identity of the parties varies slightly in form, it is the same in substance. *Sunshine Anthracite Coal*, 310 U.S. at 402. I therefore conclude that collateral estoppel applies. *Cf. Montana v. United States*, 440 U.S. 147, 159-61 (1979) (issue preclusion applies even where facts have changed if prior judgment not premised on those facts).

C. *Have There Been Intervening Changes in the Legal Context?*

The majority, without further explanation, concludes that "the Kennebunkport Order represents 'an intervening change in the applicable legal context'" which renders issue preclusion inapplicable. Majority Op. at 15. I believe that the panel opinion misapplies this exception to issue preclusion.

Section 28(2)(b) of the Restatement (Second) of Judgments (1982) states that relitigation of an issue is not precluded where "a new determination is warranted in order to take account of an intervening change in the applicable legal context . . . ." The paradigmatic case, as presented in the Restatement, is that of a taxpayer held liable for tax under a certain interpretation of the law, where that interpretation is

later abandoned in favor of another which would not require liability. If, after this "intervening change," the taxpayer once again challenges his liability, the Restatement advises that issue preclusion should not apply so that "the taxpayer will be treated in those years in the same way as other taxpayers . . . ." Restatement (Second) of Judgments, § 28 cmt. c. *See also Commissioner v. Sunnen*, 333 U.S. 591, 599-600 (1948); 18 Wright & Miller § 4425 at 259-60.

The "intervening change" exception protects a party from being bound by a prior litigation where the legal grounds *upon which that prior litigation was resolved* have changed during the intervening period. In the present case, while the May 23, 1992 order no doubt constitutes a significant change in the lives of those affected by it, it has no bearing on the merits of the legal issues decided in *HRC v. Baker* and cannot constitute an "intervening change" in the law upon which that decision was grounded. Thus, the May 23, 1992 Order is not an "intervening change in the *applicable* legal context," Restatement (Second) of Judgments § 28(2)(b) (emphasis added), and does not enable plaintiffs to avoid issue preclusion.

D. *Would Issue Preclusion Result in Inequitable Administration of the Laws?*

Finally, the majority concludes that a new determination of the issues is necessary "to avoid inequitable administration of the laws." Restatement (Second) of Judgments § 28(2)(b). The panel believes that the Supreme Court may have premised its denial of certiorari in *HRC v. Baker* on the government's representation that it would bring screened-in individuals to the United States for further asylum proceedings. The government later deviated from this

representation by holding second interviews at Guantanamo Bay for Haitians with communicable disease, such as the HIV virus, *see Haitian Centers Council, Inc. v. McNary*, Nos. 92-6090, 92-6104, slip op. 4371, 4382 (2d Cir. June 10, 1992), and by inadvertently returning some screened-in Haitians to Haiti. The panel also makes the assertion, which I find unwarranted, that the May 23, 1992 Order further violated this representation by "permitt[ing] a policy, subsequently implemented, of no screening whatsoever." Majority Op. at 16. The panel concludes that, under these circumstances, application of collateral estoppel would inequitably deny plaintiffs the opportunity for Supreme Court review.

One problem with this argument is that plaintiffs are not entitled to certiorari, which is granted on a discretionary basis. But even if the argument were that the government had inequitably dampened plaintiffs' chances of attaining Supreme Court review, it seems to me that the proper redress is to be found in the Supreme Court, not this one. Plaintiffs have no cause to argue that this court should fail to apply collateral estoppel. After all, there is no dispute that they received full appellate court review in *HRC v. Baker*. Their argument must be that they were denied a full opportunity to gain *Supreme Court* review on the merits, and that that Court, in deciding whether to hear an appeal from our collateral estoppel ruling, should, for reasons of equity, take the case up on the merits as well. Equity does not require that we hesitate to apply collateral estoppel. In sum, I believe that the *HRC v. Baker* litigation operates as collateral estoppel with respect to the following issues: (1) whether INA § 243(h) applies extraterritorially, *see HRC v. Baker* II, 953 F.2d at 1509-10; (2) whether

Article 33 is self-executing, *see HRC v. Baker I*, 949 F.2d at 1110; and (3) whether the Administrative Procedure Act gives plaintiffs a right to judicial review, *see HRC v. Baker* II, 953 F.2d at 1503-1506. The *HRC v. Baker* court decided all three issues against plaintiffs.

II. *The Merits.*

The majority holds that section 243(h)(1) of the Immigration and Nationality Act and Article 33 of the Convention relating to the Status of Refugees support plaintiffs' request for injunctive relief. I believe that these provisions do not apply to aliens on the high seas. Thus, even if *HRC v. Baker* did not collaterally estop plaintiffs, I would dissent on the merits.

A. *Ambiguity in § 243(h)(1).*

Prior to 1980, INA § 243(h), 8 U.S.C.A. 1253(h) (1970), read:

> Withholding of deportation
>
> (h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), amended the provision to read, in pertinent part, as follows:

> (h) Withholding of deportation or return
>
> (1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1253(h) (Supp. 1992).

The Supreme Court has pointed out that the 1980 amendments effected three important changes in § 243(h):

> The amendment (1) substituted mandatory language for what was previously a grant of discretionary authority to the Attorney General to withhold deportation after making the required finding; (2) substituted a requirement that the Attorney General determine that the 'alien's life or freedom would be threatened' for the previous requirement that the alien "would be subject to persecution," and (3) broadened the relevant causes of persecution from reasons of "race, religion or political opinion" to encompass "nationality" and "membership in a particular social group" as well.

INS v. Stevic, 467 U.S. 407, 421 & n.15 (1984).

The panel believes that the plain language of the provision effects a fourth major change, not noted by the Supreme Court: extension of the provision's reach beyond the United States territory. Prior to the 1980 amendments, INA § 243(h) applied only to those in deportation proceedings who were "within the United

States." *See Leng May Ma v. Barber*, 357 U.S. 185 (1958). The panel, however, concludes that the Refugee Act's addition of the words "or return," and its deletion of the phrase "within the United States," make § 243(h)(1) applicable to aliens outside the territorial United States. The majority believes that the plain language unambiguously supports this reading thereby foreclosing review of the legislative history. *See* Majority Op. at 19, 25-27.

I find the plain language ambiguous. While the majority correctly states that the § 243(h)(1) term "any alien," as defined at 8 U.S.C. § 1101(a)(3), contains no geographic restrictions, Majority Op. at 19, these words do not require the majority's position. Congress used the same term "any alien" in § 243(h) before the 1980 amendments where, at least since the 1958 *Barber* case, there has been no question as to its non-extraterritorial application. Moreover, § 243(h)(1), as amended in 1980, states that "[t]he Attorney General shall not deport . . . any alien," 8 U.S.C. § 1253(h)(1) (emphasis added). Yet no one could seriously contend (and the majority does not contend) that § 243(h)(1) proscribes the "deportation" of aliens on the high seas. As I shall have occasion to explain below, an alien can only be "deported," in the technical sense of that term, from United States territory. *See infra* at 16-18. The term "any alien" cannot have a different meaning in § 243(h)(1) depending upon whether it is the object of the verb "deport" or "return". The key question, and to me the only question of statutory interpretation necessary to decide this case, therefore, is whether § 243(h)(1) similarly prohibits "return" only from United States territory. If the term "return" does contain such a limitation, then the words "any alien" cannot alter it.

The majority acknowledges, as it has to, that the statute does not define where § 243(h)(1) prohibits "return" from. The panel concludes, however, that "what is important is the place 'to' which, not 'from' which, the refugee is returned." Majority Op. at 27. This reasoning fails on two grounds. First, "our immigration laws have long made a distinction" between those aliens within our territory, and those outside of it. *Barber*, 357 U.S. at 187. In light of this history, the majority errs by dismissing such distinctions as not "important." Secondly, the majority's approach flies in the face of the well-established principle that where the statute is silent on a key interpretive issue "we must look past the text to . . . [the] legislative history." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). Congress' silence as to the location from which § 243(h)(1) prohibits return thus requires that we consult the legislative history.

Even if the plain language did unambiguously support plaintiffs' position I would find that "there is a 'clearly expressed legislative intention' contrary to that [plain] language." *United States v. James*, 478 U.S. 597, 606 (1986). Under either rationale, I believe that examination of the legislative history is necessary. I turn now to that task.

B. *The legislative history clarifies the word "return".*

The Refugee Act of 1980 did extend the scope of INA § 243(h), but not as broadly as the majority supposes. Briefly stated, the legislative history demonstrates that Congress intended, by means of the word "return," to expand the provision to encompass "excludable," as well "deportable," aliens. Excludable aliens, like deportables, are "physically present in the United States." *Li v. Greene*, 767 F. Supp. 1087, 1088

(1991). Thus, while Congress did broaden the provision's reach it did not expand it to aliens physically outside of United States territory. Section 243(h)(1) as amended does not cover aliens interdicted on the high seas such as the plaintiffs in this case who are neither deportable nor excludable.

1. *The terminology of immigration law.*

A proper understanding of § 243(h)(1) requires some familiarity with the concepts "deportation" and "exclusion" as used in immigration law. The basic distinction is straightforward. An alien who has "entered" the United States is subject to deportation proceedings. An alien "who is physically present in the United States, without making a legal entry," however, is subject to exclusion proceedings. *Li v. Greene*, 767 F. Supp. 1087, 1088 (1991); *see also, e.g., Leng May Ma v. Barber*, 357 U.S. 185, 187-88 (1958) (exclusion proceedings appropriate for alien who has not made legal entry even "though the alien is physically within the United States"); *Bertrand v. Sava*, 684 F.2d 204, 205 n.1 (2d Cir. 1982) (defining an excludable alien as one "who has reached our border but has not been formally permitted to enter the country. Even though physically present in the country, he is 'treated as if stopped at the border.'") (citation omitted); *Ledesma-Valdes v. Sava*, 604 F. Supp. 675, 680 (S.D.N.Y. 1985) ("Excludees, although physically present in the United States, are 'treated as if stopped at the border.'"). An alien who has not yet physically entered United States territory is, of course, subject neither to deportation nor exclusion proceedings.

To complicate matters a bit, deportation is sometimes referred to as "expulsion" and has occasionally

been used loosely to encompass both expulsion and exclusion proceedings. Use of the term deportation to encompass exclusion, however, "reflects none of the technical gloss accompanying its use as a word of art. . . ." *Barber*, 357 U.S. at 187; *see also Bertrand*, 684 F.2d at 205 n.1. For present purposes, we properly distinguish between "deportation" and "exclusion" as these different concepts are recognized in immigration law.

"Entry," the status which renders an alien subject to deportation as opposed to exclusion, involves:

> (1) a crossing into the territorial limits of the United States, i.e. physical presence; 2(a) an inspection and admission by an immigration officer or (b) actual and intentional evasion of inspection at the nearest inspection point; and (3) freedom from official restraint.

Correa v. Thornburgh, 901 F.2d 1166, 1171 (2d Cir. 1990) (quoting *Matter of Ching and Chen*, Interim Decision 2984, at 3 (BIA 1984)). Thus, in practical terms, if the government wishes to remove an alien whom it has inspected and admitted at the border, or who has evaded inspection, and who is in United States territory "free[] from official restraint," *id.*, it may do so only through deportation proceedings. Where the government has detained the alien at a border crossing, an airport or on a ship, physically within United States territory or territorial waters but without an "entry" having been effected, it may remove him or her pursuant to an exclusion hearing. This is true even where the Attorney General has "paroled" a detainee into the country. *See* 8 U.S.C. § 1182(d)(5). In the eyes of the law, such a person is deemed "stopped at the border,"

Shaughnessy v. Mezei, 345 U.S. 206, 215 (1953), and is not "within the United States," *Barber*, 357 U.S. at 189, even though physically present. The distinction is important because, as we have noted, "[d]eportation proceedings are generally more favorable to the alien than exclusion proceedings." *Correa*, 901 F.2d at 1171 n.5; *see also Maldonado-Sandoval v. INS*, 518 F.2d 278, 280 n.3 (9th Cir. 1975).

2. *The 1980 Amendments to INA § 243(h).*

Prior to 1980, § 243(h) protected a refugee, in the Attorney General's discretion, only against "deportation . . . to any country in which in his opinion the alien would be subject to persecution. . . ." 8 U.S.C.A. § 1253(h) (1970). In *Leng May Ma v. Barber*, 357 U.S. 185, 187-89 (1958), the Supreme Court accordingly held that § 243(h) covered only deportable, and not excludable, aliens. *See also INS v. Stevic*, 467 U.S. 407, 415 (1984).

The Refugee Act of 1980 opened up § 243(h) to excludables. The House Report explains quite clearly that "*section 203(e)* [of the Refugee Act] amends section 243(h) of the Act, relating to withholding of deportation, to require (with some exceptions) the Attorney General to withhold deportation of aliens who qualify as refugees *and who are in exclusion as well as deportation proceedings.*" H.R. Rep. No. 608, 96th Cong., 1st Sess., 30 (1979) (emphasis added). This piece of legislative history goes a long way towards answering the interpretive question before us. It demonstrates that Congress intended to broaden § 243(h)(1) to apply to excludables, but did not extend the provision to aliens outside United States territory.

In addition, the reference to excludables clarifies the meaning of "return." To bring excludables within the terms of § 243(h) Congress had to change the statutory language in two ways. First, it had to delete the words "within the United States" which, the Supreme Court had held, covered only deportables. *See Barber*, 357 U.S. at 188. Secondly, it had to modify the word "deportation" since this term, too, limited the scope of § 243(h) to deportables, not excludables. *Id.* at 187-90. To signify the intended broader scope Congress therefore added the words: "or return." Statutes and case law had previously used "return" in this manner. *See* 8 U.S.C.A. § 1182(a)(26) (1970) (discussing "return [of excludable alien] to country from which he came"); 8 U.S.C.A. § 1182(d)(6) (1970) ("[t]he Attorney General shall prescribe conditions . . . to control and regulate the admission and return of excludable aliens. . . ."); *Barber*, 357 U.S. at 187 (describing "the return of excluded aliens from the country"); *United States v. Murff*, 176 F. Supp. 253, 256 & n.13 (S.D.N.Y. 1959) ("The return of aliens who seek and who are denied admission into the United States is governed by the exclusion provisions, whereas the deportation of aliens . . . is governed by the expulsion provisions of the act."). Thus, just as "deport" refers to deportables, Congress intended "return" to refer to excludables.

The legislative history provides additional support for this reading. For example, Congress' decision in the 1980 amendments to continue to address the provision to the "Attorney General," 8 U.S.C. § 1253(h)(1) (Supp. 1992), indicates that § 243(h)(1) as amended was to be applied to deportables and excludables, aliens over which the Attorney General had operational jurisdiction, and not to other refugees or

potential refugees outside United States territory who might be encountered by other United States government personnel, be they Coast Guard, military, or the like.

Moreover, the INA grants excludables and deportables the right to seek judicial review but does not provide review for aliens outside United States territory, *see* 8 U.S.C. §§ 1105a, 1157, and those outside United States territory will not likely gain review under the APA, *see HRC v. Baker*, 953 F.2d at 1505-1507. It is unlikely that Congress would have granted rights under § 243(h)(1) to aliens outside the United States without providing them a clear means to enforce these rights. This further supports a limitation of § 243(h)(1) relief to excludables and deportables to whom judicial review is available.

The legislative history also suggests that the territorial reach of § 243(h)(1) is co-extensive with § 208(a), a provision which establishes asylum procedures for "alien[s] physically present in the United States or at a land border or port of entry," i.e. deportables and excludables. 8 U.S.C. § 1158(a) (Supp. 1992). Under the heading "Asylum and Withholding of Deportation," the House Report states that

> Since 1968, the United States has been a party to the United Nations Refugee Protocol which incorporates the substance of the 1951 Convention of Refugees which seeks to insure fair and humane treatment for *refugees within the territory of the contracting states*. . . . The Committee Amendment conforms United States statutory law to our obligations under Article 33 [of the Convention] in two of its provisions: . . . section 208 . . . [and] section 243(h).

H.R. 608 at 17 (emphasis added). Thus, sections 208 and 243(h), respectively, meet the United States' international obligation to provide asylum procedures for, and not to deport or return, "refugees within the territory of the contracting states." *Id.* Case law, and a leading commentator, also read § 243(h)(1) as co-extensive with § 208(a). *See HRC v. Baker*, 789 F. Supp. at 1575 (citing INA § 208(a) for the proposition that plaintiff's claims under INA § 243(h) "must fail because the statutory rights and protections asserted are reserved, by the very terms of the statute, to aliens within the United States"); C. Gordon & S. Mailman, 1 *Immigration Law and Procedure*, § 1.03[6][a] at 1-33 (1991) ("[r]efugee status is available [pursuant to INA § 207] to individuals screened and selected outside the United States, while asylum [pursuant to INA § 208] and withholding of deportation [pursuant to INA § 243(h)] are remedies available to those who have already reached our shores or borders and wish to secure permission to stay.")

C. *Article 33 does not create an extraterritorial obligation.*

Article 33 of the Convention relating to the Status of Refugees, 189 U.N.T.S. 150 (1954), which the United States ratified when it acceded to the 1967 Protocol relating to the Status of Refugees, 19 U.S.T. 6223 ("Protocol"), further supports the conclusion that Congress intended to limit § 243(h)(1) to deportables and excludables who are within United States territory.

The Supreme Court has stated that "if one thing is clear from the legislative history . . . the entire 1980 [Refugee] Act, it is that one of Congress' primary pur-

poses was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). Specifically, Congress intended § 243(h)(1), as amended, to be coextensive with Article 33 of the Convention. Plaintiffs concede this point, *see* Plaintiffs Brief at 14 ("Congress intended § 243(h) to have the same meaning as Article 33 of the Refugee Convention"), the legislative history overwhelmingly supports it, *see* S. Rep. No. 96-256 at 20, *reprinted in* 1980 U.S.C.A.N. at 161 (section 243(h) "is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol"); H.R. 608 at 17 ("[t]he Committee Amendment [to § 243(h)] conforms United States statutory law to our obligations under Article 33"), and the Supreme Court has consistently taken this view, *see INS v. Doherty*, 112 S. Ct. 719, 729 (1992) (Scalia, J., concurring); *INS v. Stevic*, 467 U.S. 407, 421 (1984). Thus, if Article 33 extends only to aliens within the territory of a contracting state, as I believe it does, this powerfully supports a parallel reading of § 243(h)(1). In turning to Article 33, I also address plaintiffs' (and the majority's) erroneous contention that Article 33 itself creates extraterritorial obligations for the United States. *See* Majority Op. at 27-40.

Article 33 of the Convention reads as follows:

> Article 33—Prohibition of expulsion or return ("*refoulement*")
>
> 1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The majority's "plain language" approach to the word "return" as used in Article 33 treads the same path as its analysis of INA § 243(h)(1), *see* Majority Op. at 30-31, and leaves the same unresolved question as to where the Article prohibits "return" from. Unlike INA § 243(h)(1), however, Article 33 includes next to the word "return" the explanatory bracketed French term "*refouler*". *Refouler* is not susceptible to a plain language analysis for, as the majority points out, French dictionaries provide conflicting definitions. Majority Op. at 33. The majority itself fails to settle on a meaning for this word, concluding that it is "ambiguous." Majority Op. at 39. We must, therefore, turn to the legislative history of Article 33 in order to determine the meaning of "*refouler*," and consequently of "return".

The Netherlands delegate, speaking at the second and final reading of the Draft Convention, graciously provides a precise definition:

> Baron van BOETZELAER (Netherlands) recalled that at the first reading the Swiss representative had expressed the opinion that *the word "expulsion" related to a refugee already admitted into a country, whereas the word "return" ("refoulment") related to a refugee already within the territory but not yet resident there.* According to that interpretation, article 28 would not have involved any obligations in the possible case of mass migrations across frontiers—or of attempted mass migrations.

He wished to revert to that point, because the Netherlands Government attached very great importance to the scope of the provision now contained in article 33. The Netherlands could not accept any legal obligations in respect of large groups of refugees seeking access to its territory.

At the first reading the representatives of Belgium, the Federal Republic of Germany, Italy, the Netherlands and Sweden had supported the Swiss interpretation. From conversations he had since had with other representatives, he had gathered that the general consensus of opinion was in favour of the Swiss interpretation.

In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33.

There being no objection, the PRESIDENT ruled that the interpretation given by the Netherlands representative should be placed on record.

Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Thirty-Fifth Meeting, U.S. Doc. A/Conf. 2/SR.35 at 30 (1951) (emphasis added).

The Netherlands delegate's comments unambiguously restrict the terms "expel" and "return (*'refouler'*)" to aliens physically within the territory of the contracting state. Moreover, the definition of "return (*'refouler'*)" as "already within the territory but not yet resident there" appears to correspond

to American usage of the term "excludable" which is "*synonymous with non-resident* . . . [and] describe[s] the alien who has reached our border but has not been formally permitted to enter the country." *Bertrand*, 684 F.2d at 205 n.1 (emphasis added).

While the majority cannot point to any lack of clarity in the statement of the Netherlands delegate, it finds ambiguous the "ruling" of the Conference President "that the interpretation given by the Netherlands's representative should be placed on the record." U.S. Doc. A/Conf. 2/SR.35 at 30. Judge Edwards, concurring in *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 840 (D.C. Cir. 1987), has found that this ruling constituted an "agree[ment]" among the delegates. While acknowledging Judge Edwards' "thoughtful and scholarly concurrence," the majority concludes that it is "an equally-fair reading to see this passage as simply recording the views of a dissenting member." Majority Op. at 39.

I am in accord with Judge Edwards. The President of the Conference premised his ruling on "[t]here being no objection," a finding which alone would indicate agreement. Additionally, the Conference recorded the Netherlands delegate's "interpretation," not his "views." Indeed, I cannot fathom why a member would seek to have his "views" formally recorded since that is accomplished by the transcript itself. Thus, I conclude with Judge Edwards that the Conference formally recorded the delegate's "interpretation" so as to show its agreement.

The discussion which immediately followed the President's ruling clears up any residual ambiguity:

MR. HOARE (United Kingdom) remarked that the Style Committee had considered that the word "return" was the nearest equivalent in

English to the French term "*refoulement*". He assumed that the word "return" as used in the English text had no wider meaning.

The PRESIDENT suggested that in accordance with the practice followed in previous Conventions, the French word "*refoulement*" ("*refouler*" in verbal uses) should be included in brackets and between inverted commas after the English word "return" wherever the latter occurred in the text.

He further suggested that the French text of paragraph 1 should refer to refugees in the singular . . . .

The two suggestions made by the President were adopted unanimously.

U.N. Doc. A/Conf. 2/SR.35 at 30-31 (emphasis added).

These statements evidence the delegates' unanimous agreement that "return ('*refouler*')" be limited to non-resident aliens within a contracting state's territory. Only by reading Mr. Hoare's "*refouler*" as different from Baron van Boetzelaer's can one escape this conclusion. Both, however, were attending the same conference, and Mr. Hoare, who spoke immediately following the Baron, expressed no disagreement with his interpretation. Thus, there is no basis to suggest that they were interpreting the word differently. This negotiating history is to me unambiguous. Moreover it is, to my knowledge, the only document which directly explains the placement of "refouler" in Article 33; consequently, it is the linch-pin to understanding the word "return" as utilized in that provision.

Article 40 of the Convention, incorporated by reference in Article 7.4 of the Protocol, *see Protocol*, 19 U.S.T. at 6228, supports the same, limited reading of Article 33. Article 40, entitled "Territorial application clause," provides that

> (1) Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State Concerned.

189 U.N.T.S. 150. Thus, pursuant to Article 40, the Convention does not automatically reach beyond a contracting state's sovereign territory even to those other territories, such as colonies, which it administers. Nothing in Article 40 exempts Article 33 from this proviso. It follows that Article 33 does not, as the majority contends, extend automatically to aliens throughout the globe. I note parenthetically that the United States has taken no action pursuant to Article 40.

I conclude that Article 33, which plaintiffs concede to have the same territorial reach as § 243(h)(1), applies only to aliens physically within the territory of a given state. Most commentators adopt this view. *See* Aga Khan, *Legal Problems Relating to Refugees and Displaced Persons*, 149 Recuil Des Cours (Hague Academy of International Law) 287, 318 (1976) (only refugees "already within the territory of the Contracting State" may avail themselves of right to *non-refoulement*); Weis, *The United Nations Declaration of Territorial Asylum*, 7 Canadian Yearbook Int'l L., 92, 123-24 (1969) (adopting Netherlands

delegate's interpretation of "expel" and "return"); Note, *The Right to Asylum Under United States Law*, 80 Colum. L. Rev. 1125, 1126-27 (1980) (rights under Article 33 of the Convention do[] not extend to refugees outside the contracting country's borders.").

D. *Congress has authorized the President's policy.*

Plaintiffs assert that even if the President's actions do not contravene § 243(h)(1) and Article 33, they are nonetheless without legal authority. The government, in response, relies on INA §§ 212(f) and 215(a)(1), which read as follows:

> § 1182(f) [INA § 212(f)] Suspension of entry or imposition of restrictions by President. Whenever the President finds that the entry of any aliens or of any class of aliens would be detrimental to the United States, he may . . . suspend the entry of all aliens . . . or impose on the entry of aliens any restrictions he may deem appropriate."
>
> § 1185(a)(1) [INA § 215(a)(1)]. Travel Control of citizens and aliens
>
> (a) Restrictions and prohibitions. Unless otherwise ordered by the President, it shall be unlawful—(1) for any alien to depart from or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe . . . .

The majority dismisses these provisions on the grounds that the President's authority to regulate "entry" does not permit him to "return" refugees to Haiti. Majority Op. at 41. The majority's attempt to distinguish between entry restrictions and repatriation, however, does not withstand scrutiny. In the context of this case the two policies are inextricably intertwined. As the record makes clear, most Haitians seeking entry set sail on the 600 mile ocean voyage in overcrowded, unseaworthy craft with a demonstrable risk to life (evidenced in one case by a May 17, 1992 capsizing with a loss of half of the boat's forty passengers). The President cannot simply draw a "line in the sea" over which no Haitian vessel may cross. To do so would risk additional sea disasters with the attendant loss of life. Faced with this difficult policy choice which, I note, courts are without competency to evaluate, *Harisiades v. Shaughnessy*, 342 U.S. 304, 319 (1936), the President has determined that the only feasible way to regulate "entry" is to promptly interdict and repatriate Haitian vessels. Congress' broad delegation of the power to "impose on the entry of aliens any restrictions [the President] may deem appropriate," 8 U.S.C. § 1182(f), and to establish "reasonable . . . orders" regulating entry, 8 U.S.C. § 1185(a)(1), easily encompass this policy choice.

Insofar as the majority relies on the assertion that the government may be interdicting Haitians seeking entry to countries other than the United States, Majority Op. at 42, I note that this issue is not properly before our Court. As plaintiffs themselves state: "[t]his case . . . [involves] defendants' blanket decision to implement an immigration policy . . . in massive disregard *for* [*plaintiffs'*] *asylum claims.*" Plaintiff's Brief at 30 (emphasis added). The plaintiffs in this case are seeking asylum in, and thus "entry" into, the United States. This litigation does not properly present the question of aliens seeking passage to other nations.

Accordingly, INA § 212(f) and § 215(a)(1) fully authorize the challenged Presidential action. Even if Congress had not authorized the May 23, 1992 policy, I would find sufficient authority in the President's inherent powers over immigration, *see Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950), and foreign affairs, *see United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

E. *Conclusion.*

The legislative history of § 243(h)(1), including as it must Article 33 and its negotiating history, clears up the textual ambiguities in this case and demonstrates conclusively that the United States' duty of *non-refoulement* pertains only to deportable and excludable refugees physically present in its territory and does not reach those, such as plaintiffs, who are on the high seas. Thus, the INA does not prohibit the May 23, 1992 policy; rather, it authorizes it in §§ 212(f) and 215(a)(1). "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Faced with such combined Presidential and Congressional authority, I would deny plaintiffs' request for injunctive relief.

I am strengthened in this conclusion by the well-established judicial reticience, in the absence of a clear legal mandate, to grant relief which would undermine the President's authority in foreign affairs. *See Dep't of Navy v. Egan*, 484 U.S. 518, 529-30 (1988); *Haig v. Agee*, 453 U.S. 280, 290-92 (1981);

Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 109-11 (1948); *see generally, United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-22 (1936). The interdiction and return policy embodied in the May 23, 1992 Order was not confined to an immigration crisis but was squarely in the foreign affairs arena. To be sure, the dramatic surge in Haitian migration following the September 30, 1991 coup that overthrew the democratically elected government of Bertrand Aristide and that led to 34,000 interdictions from October 1991 through May 1992 (as compared with 25,000 interdictions over the previous decade) precipitated an immigration crisis of substantial dimension. However, according to Under Secretary of State Kantor in a May, 1992 affidavit filed in this action, the massive migration outflow also gave the *de facto* Haitian government leverage against those nations who, like the United States, were pressing for a return to democracy in Haiti.

In a January 1992 affidavit filed in the *HRC v. Baker* litigation, Assistant Secretary of State Aronson cited "credible" reports that the *de facto* Haitian government "intend[ed] to encourage massive outmigration" in order to pressure the United States and the Organization of American States "into dropping their concerted efforts . . . to restore constitutional democratic government in Haiti." Thus, the May 23, 1992 Order was part of the United States' response to a foreign policy crisis, and accordingly deserves "the utmost deference." *United States v. Nixon*, 418 U.S. 683, 710 (1974).

Finally, while I do not rely on it because I see no need to do so in light of the clear purposes underlying

the 1980 amendments to § 243(h)(1), I note that the presumption against extraterritorial application, of domestic legislation also weighs against plaintiffs' claim. *See EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1230 (1991).

I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1789, 1790—August Term 1991

(Argued: May 13, 1992 Decided: June 10, 1992)

Docket Nos. 92-6090 and 92-6104

HAITIAN CENTERS COUNCIL, INC.; NATIONAL COALITION FOR HAITIAN REFUGEES; IMMIGRATION LAW CLINIC OF THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION OF NEW HAVEN, CONNECTICUT; DR. FRANTZ GUERRIER; PASCAL HENRY; LAURITON GUNEAU; MEDILIEU SOREL ST. FLEUR; DIEU RENEL; MILOT BAPTISTE; JEAN DOE; ROGES NOEL, on Behalf of themselves and all others similarly situated; A. IRIS VILNOR, on Behalf of herself and all others similarly situated; MIREILLE BERGER; YVROSE PIERRE; MATHIEU NOEL, on Behalf of themselves and all others similarly situated, PLAINTIFFS-APPELLEES,

—*v.*—

GENE MCNARY, Commissioner, Immigration and Naturalization Service; WILLIAM P. BARR, Attorney General; Immigration and Naturalization Service; JAMES BAKER, III, Secretary of State; Rear Admiral ROBERT KRAMEK, Admiral KIME, Commandants, United States Coast Guard; Commander, U.S. Naval Base, Guantanamo Bay, DEFENDANTS-APPELLANTS.

Before:

CARDAMONE, PIERCE, and MAHONEY,
Circuit Judges.

PIERCE, *Circuit Judge*:

The Immigration and Naturalization Service ("INS") and various United States governmental officials appeal from an order entered in the United States District Court for the Eastern District of New York, Sterling Johnson, Jr., *Judge*, granting a preliminary injunction, and from a subsequent clarifying order. For the reasons set forth below, we affirm, as modified.

BACKGROUND

General Background

In September 1981, then-President Ronald Reagan determined that "[t]he ongoing migration of persons to the United States in violation of our laws is a serious national problem detrimental to the interests of the United States." Proclamation No. 4,865, 46 Fed. Reg. 48,107 (1981), *reprinted in* 8 U.S.C.A. § 1182 note (West Supp. 1992). President Reagan, by Executive Order 12,324 ("Executive Order"), authorized the Secretary of State "to enter into, on behalf of the United States, cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea." Exec. Order 12,324, 46 Fed. Reg. 48,109 (1981), *reprinted in* 8 U.S.C.A. § 1182 note (West Supp. 1992).

On September 23, 1981, the United States entered into an agreement with Haiti for "the establishment of a cooperative program of interdiction and selective

return to Haiti of certain Haitian migrants and vessels involved in illegal transport of persons coming from Haiti." Agreement Between the United States of America and Haiti, September 23, 1981, U.S.-Haiti, T.I.A.S. No. 10,241. Under this agreement, United States authorities are permitted to board a "Haitian flag vessel" to make inquiries to determine the registry, condition and destination of the vessel and the status of those on board the vessel. If the United States determines that a violation of its laws or the laws of Haiti has been committed, it may detain the vessel and those found on board. The United States is permited to return the detained vessel and persons to a Haitian port, or if circumstances permit, release such vessel and migrants on the high seas to representatives of the Haitian government. The agreement provided that the United States "does not intend to return to Haiti any Haitian migrants whom United States authorities determine to qualify for refugee status." In addition, the United States received assurances from Haiti that Haitians returned to their country would not be subject to prosecution for illegal departure.

In September 1981, the United States Coast Guard began interdicting vessels carrying Haitian aliens. Generally, under the interdiction program, INS officers interview interdicted Haitians to determine if there are any indications that a person might qualify as a "refugee." The purpose of this process, known as "pre-screening," is to determine whether the interdicted alien has a "credible fear of persecution." This process was designed to take place when the interdicted aliens are taken into custody on the Coast Guard cutters on the high seas. Those individuals

found to have a credible fear of persecution if returned to Haiti are "screened in," and are eligible for transfer to the United States to pursue an asylum claim. Those individuals found not to have a credible fear are "screened out," and are repatriated to Haiti.

On September 30, 1991, the democratically elected government of Haiti was overthrown in a military coup, and its President, Jean-Bertrand Aristide, was forced into exile. Following the coup, reports surfaced of human rights violations by the military in Haiti. These alleged violations included killings, torture, arbitrary arrests without a warrant and the destruction of property. Allegedly, the Haitian miliary has targeted President Aristides' political supporters for threats, intimidation and persecution. Following the coup, the United States joined other nations in announcing the imposition of economic sanctions against Haiti.

Since the coup, thousands of people have fled from Haiti, mostly by boat. As a result of this substantial increase in migration from Haiti, the number of interdictions also increased. Following the coup, the United States temporarily suspended repatriations under the interdiction program. However, as of November 18, 1991, the United States resumed repatriations.

The Baker Litigation

On November 19, 1991, the Haitian Refugee Center, Inc. ("HRC"), filed a complaint in the United States District Court for the Southern District of Florida challenging aspects of the interdiction program and seeking declaratory and injunctive relief (the "Florida Action"). *See Haitian Refugee Center,*

Inc. v. Baker, 953 F.2d 1498, 1502-03 (11th Cir.) (per curiam), *cert. denied*, 112 S. Ct. 1245 (1992). Named as defendants were: James Baker III, Secretary of State; Rear Admiral Robert Kramek and Admiral Kime, Commandants, United States Coast Guard; Gene McNary, Commissioner, Immigration and Naturalization Service; the United States Department of Justice; the Immigration and Naturalization Service; and the United States ("defendants in the Florida Action"). The Florida Action complaint asserted claims allegedly arising under the Exectuive Order, international law, the United Nations Protocol Relating to the Status of Refugees, United States immigration statutes and the fifth amendment. More specifically, HRC maintained that the INS had failed to comply with its own guidelines for the identification of refugees, promulgated pursuant to the Executive Order, and, thus violated the rights of the interdicted Haitians. On that same day, the district court granted HRC's application for a temporary restraining order to maintain the *status quo*. This order precluded the defendants in the Florida Action from repatriating Haitians held on board United States vessels and held at the United States Naval Base, Guantánamo Bay, Cuba.

Following expedited discovery, HRC filed a second amended complaint and supplemental pleading adding claims on behalf of a putative class of Haitian plaintiffs. In addition to the claims asserted in the initial complaint, the second amended complaint alleged claims under the first amendment and the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (1988) ("APA"). More specifically, the second amended complaint alleged, *inter alia*, that the Flor-

ida Action defendants had denied the HRC access to the interdicted Haitians and argued that such denial was a violation of the first amendment. In addition, the second amended complaint claimed that the INS' interviewing process was in violation of the APA. In an order dated December 3, 1991, the district court determined that the second amended complaint could be maintained as a class action. On that same day, the court granted a motion for a preliminary injunction, finding that there was a substantial likelihood that the plaintiffs in the Florida Action would prevail on the merits of HRC's first amendment claim and the Haitian plaintiffs' claims under the Protocol. The district court concluded that the fifth amendment claims of the Florida Action plaintiffs "must fail." The defendants appealed.

On December 17, 1991, the Eleventh Circuit dissolved the preliminary injunction, finding it to be overly broad with regard to HRC's first amendment claim, and remanded with instructions to dismiss the Haitian plaintiffs' claims under the Protocol. *Haitian Refugee Center, Inc. v. Baker*, 949 F.2d 1109, 1111 (11th Cir. 1991) (per curiam). Later that evening, the district court issued a temporary restraining order based upon a reconsideration of the claims of the plaintiffs in the Florida Action under the APA, whereupon, the Eleventh Circuit stayed that order pending appeal. *Haitian Refugee Center, Inc. v. Baker*, 950 F.2d 685, 687 (11th Cir. 1991) (per curiam).

On December 20, 1991, the district court entered an order granting the plaintiffs in the Florida Action a limited preliminary injunction on HRC's first amendment claim. This order was supplemented by an order entered December 23, 1991 based upon the claims

under the APA. These orders were stayed pending appeal.[1] On February 4, 1992, the Eleventh Circuit dismissed the appeal from the December 17 order as moot, and vacated the December 20 and December 23 orders. Further, the Eleventh Circuit remanded the case with instructions that the district court dismiss the complaint for failure to state a claim upon which relief could be granted. *See Baker*, 953 F.2d at 1515. On February 24, 1992, the Supreme Court denied the Florida Action plaintiffs' application for a stay of the mandates and denied the Florida Action plaintiffs' petition for a writ of certiorari. *Haitian Refugee Center, Inc. v. Baker*, 112 S. Ct. 1245 (1992).

The Present Litigation

On March 18, 1992, the plaintiffs herein filed a complaint in the United States District Court for the Eastern District of New York (the "New York Action"). Named as defendants are: Gene McNary, Commissioner, Immigration and Naturalization Service; William P. Barr, Attorney General; Immigration and Naturalization Service; James Baker III, Secretary of State; Rear Admiral Robert Kramek and Admiral Krime, Commandants, United States Coast Guard; and Commander, United States Naval Base, Guantánamo Bay.

The plaintiffs in the present litigation are: Haitian Centers Council, Inc.; the National Coalition for Haitian Refugees, Inc.; Immigration Law Clinic of the Jerome N. Frank Legal Services Organization of New Haven, Connecticut (collectively the "Haitian Service

[1] The district court stayed the December 23 order. On January 31, 1992, the Supreme Court stayed the December 20 order.

Organizations"); several "screened in" Haitians on behalf of themselves and others similarly situated (" 'screened in' plaintiffs"); several "screened out" Haitians on behalf of themselves and others similarly situated (" 'screened out' plaintiffs"); and several immediate relatives of Haitians detained at Guantánamo Bay on behalf of themselves and others similarly situated (" 'immediate relative' plaintiffs").

The complaint, *inter alia*, challenged the refusal by the defendants in the New York Action to allow the Haitian Service Organizations to have access to the Haitian migrants on board Coast Guard cutters and at Guantánamo Bay for the purpose of providing them "legal counsel, advocacy, and representation" as a violation of the first amendment. In addition, in the New York Action, the complaint alleged that current governmental conduct under the interdiction program was in violation of United States immigration statutes, the fifth amendment, the APA, certain treaties and international agreements and executive directives.

On March 27, 1992, following oral argument, the district court in the New York Action granted the plaintiffs' motion for a temporary restraining order. The defendants argued that the rulings in the Florida Action precluded prosecution of the claims asserted by the New York Action plaintiffs; the district court responded that it agreed that the Florida Action rulings precluded assertion of the "screened out" plaintiffs' claims. With regard to the Haitian Service Organizations, the "screened in" plaintiffs, and the "immediate relative" plaintiffs, the court ruled that their claims were not barred by the Florida Action rulings.

On April 7, 1992, after conducting a hearing, the court granted the application of the plaintiffs in the New York Action and issued a preliminary injunction ("April 7 order"). The district court made, *inter alia*, findings of fact as set forth below.

The United States operates a naval base at Guantánamo Bay, Cuba. The area comprising the base is occupied pursuant to a lease between the United States and Cuba entered into in 1903, and amended by a 1934 treaty. The district court found that the United States base at Guantánamo Bay is a "relatively open base." Besides military personnel stationed there, there are "foreign nationals," civilian contractors of various nationalities and civilian United States employees present on the base.

The district court further found that, under the interdiction program, the Coast Guard has taken Haitian aliens interdicted on the high seas into custody and transported them to Guantánamo Bay. The Haitian aliens at Guantánamo Bay live in camps surrounded by razor wire fences. No Haitian alien is free to leave Guantánamo Bay to travel to any country other than Haiti, even at their own expense. They are not allowed access to telephones. Although the United States officials at Guantánamo Bay have provided the Haitian aliens with various services including educational programs, medical care and religious services, they have denied the aliens access to legal services. Congressmen, clergymen, church groups, and members of the press have been allowed access to the base and the Haitian aliens.

Further findings made were: under the interdiction program, INS officers at some point interview interdicted Haitians to determine whether they have a

"credible" fear of political persecution if returned to Haiti. The district court found that those determined to have a credible fear are "screened in," and are to be brought to the United States so that they may pursue asylum claims. Those found not to have a credible fear are "screened out," and are to be repatriated to Haiti. Repatriated Haitians face political persecution and even death upon their return.

The district court also found that following the rulings of the Eleventh Circuit in the Florida Action, the government defendants therein, in a memorandum submitted to the Supreme Court in opposition to the plaintiffs' petition for certiorari, explicitly represented that "screened in" individuals would be brought to the United States so that they could file applications under the Immigration and Nationality Act ("INA") for asylum. Five days after the Supreme Court denied certiorari in the Florida Action, the defendants in the Florida Action changed this policy. On February 29, 1992, the General Counsel of the INS, Grover Joseph Rees, issued a memorandum regarding second interviews of "screened in" Haitians who have been determined to have a communicable disease and thus are subject to medical exclusion under the INA. The district court found that the government tests all Haitian aliens who have been "screened in" to determine whether they have a communicable disease such as the HIV virus. According to the Rees memorandum, "screened in" Haitian aliens who have been found to have a communicable disease are to be given a second interview to determine if they have "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." The memorandum also

states that this interview should "be identical in form, and substance or nearly so as possible, to those conducted by asylum officers to determine whether asylum should be granted to an applicant already in the United States." However, while asylum applicants in the United States may have attorneys present during their asylum interviews, the "screened in" Haitians subject to a second interview are not permitted access to an attorney during their second interview at Guantánamo Bay.

The district court found: when the INS officers began conducting second interviews, the Haitian aliens including the "screened in" plaintiffs herein began to seek the assistance of counsel. According to the deposition testimony of INS officers at Guantánamo Bay, the presence of attorneys during the second interviews could be useful, would be feasible and would not interfere with the interviewing process. Thirty four "screened in" Haitians who had tested positive for HIV and had failed to establish a "well-founded" fear of persecution during a second interview at Guantánamo Bay would have been repatriated absent the temporary restraining order. In addition, INS officials at Guantánamo Bay lost the records of a number of Haitian aliens and, consequently, some Haitian aliens had to be re-screened. After stating its findings of fact, the district court proceeded to draw conclusions of law. As an initial matter, it ruled that the claims of the "screened in" plaintiffs, the "immediate relative" plaintiffs, and the Haitian Service Organizations were not precluded by the Florida Action. Addressing the legal standard for the issuance of a preliminary injunction, the court determined that the "screened in" plaintiffs and the plaintiffs comprising

the Haitian Service Organizations had made a showing of irreparable harm by a preponderance of the evidence. It also concluded that there were serious questions going to the merits with regard to the Hatian Service Organizations' first amendment claim and the "screened in" plaintiffs' fifth amendment claim, but it found that the "screened in" plaintiffs could not state statutory claims under the INA. The court assessed the balance of hardships, and found that they tipped decidedly in favor of the plaintiffs. The court thus concluded that the standards for the issuance of a preliminary injunction had been satisfied, although it reserved judgment of several claims raised in the complaint. In addition, the court conditionally certified as a class the "screened in" plaintiffs.[2]

The district court in the New York Action granted the plaintiffs' application for a preliminary injunction on April 7, 1992. On April 8, 1992, the court denied the defendants' motion to stay the April 7 order. At that time, addressing a question as to whether serious questions going to the merits was the proper legal standard for the issuance of a preliminary injunction when the government was the responding party, the court stated that even if the

[2] The district court stated: "Although the Screened In Plaintiff's motion for class certification is granted at this time, because the defendant challenges certain of plaintiff's factual allegations, I will permit them to conduct discovery and then this court will hold a hearing to ascertain whether the class certification herein granted should be modified."

Although the district court addressed the preclusive effect of the Florida Action as to the "screened out" plaintiffs and the "immediate relative" plaintiffs, it did not formally address the issue of class certification with regard to either group.

appropriate standard were "likelihood of success on the merits," that standard also had been satisfied.

On April 14, 1992, this Court denied the defendants' motion for a stay of the April 7 order, but granted an application to expedite the appeal. On April 15, 1992, the district court issued an order to "clarify the relief granted in the [April 7] Memorandum and Order." Under this order, the New York Action defendants were enjoined from:

> (a) denying the Haitian Service Organizations immediate access, on Guantanamo, to any member of the class of Screened In Plaintiffs subject to reasonable time, place and manner limitations (regardless of whether any such Screened In Plaintiff has been furnished with an exact date and time for interview) for the purpose of providing them legal counsel, advocacy and representation;
>
> (b) interviewing, screening, or subjecting to exclusion or asylum proceedings any Screened In Plaintiffs who has been denied an opportunity to communicate with counsel; and
>
> (c) repatriating any member of [the] class of Screened In Plaintiffs who was subjected to a second interview at which time s/he was screened out, until such time as such individual is afforded an opportunity to communicate with Haitian Service Organizations and given another interview thereafter.
>
> Notwithstanding paragraphs (b) and (c) above, the Government may, at any time, transport members of the Screened In Plaintiff class to the mainland United States in accordance with the Government's represetations to this court.

The defendants in the New York Action filed a notice of appeal from this order on April 18, 1992. The New York Action defendants also moved for a stay of the April 15 order as to paragraph (a). The district court denied the defendants' application. On April 17, 1992, this Court denied an application by the defendants for a stay. On April 22, 1992, the Supreme Court granted the defendants' application for a stay of the preliminary injunction under the April 7 order, as clarified by the April 15, order, pending disposition of the appeal by this Court.

DISCUSSION

Preclusive Effect of the Florida Action

On appeal, the defendants in the New York Action (hereinafter "appellants") claim, *inter alia*, that the district court erred in concluding that the "screened in" plaintiffs' fifth amendment claims were not barred by the Florida Action, and that the court erred in issuing its preliminary injunction.

The appellants argue that the Florida Action resolved the question of whether the fifth amendment confers procedural rights upon aliens abroad seeking to enter the United States. They contend that the "screened in" plaintiffs in the present case were members of the class certified in the Florida Action and thus their fifth amendment claims are barred by the doctrine of collateral estoppel. We briefly review some aspects of the Florida Action before addressing this contention.

In the complaint filed November 18, 1991, in the United States District Court for the Southern District of Florida, the Haitian Refugee Center, Inc.

("HRC") alleged that it sought to represent the interests of Haitians who had been intercepted by the United States Coast Guard. HRC sought declaratory relief that the Florida Action defendants' practices of "forcibly returning Haitian refugees to Haiti" violated, *inter alia*, the fifth amendment to the United States Constitution. HRC subsequently filed a second amended complaint, naming as additional plaintiffs fifteen individual Haitians asserted to have been "picked up at sea by the United States Coast Guard." According to the second amended complaint, fourteen of these individual Haitians had been "screened out." The second amended complaint alleged that these fourteen persons were subjected to an "interview [that] was inadequate to allow [them] to meaningfully assert [their] claim for asylum."[3]

The plaintiffs in the Florida Action moved pursuant to Fed. R. Civ. P. 23 to certify as a class:

> all Haitian aliens who are currently detained or who will in the future be detained on U.S. Coast Guard cutters or at Guantanamo Naval base who were interdicted on the high seas pursuant to the United States Interdiction Program and who are being denied First Amendment and procedural rights.

In a memorandum of law submitted to the district court in support of their request for class action certification, the plaintiffs in the Florida Action asserted that the fifteen new plaintiffs "are all presently members of

[3] It is unclear whether the fifteenth individual was "screened out" but the amended complaint alleged that his asylum interview lasted three minutes and that prior to his interview he was advised "that no matter what he said, he would be returning to Haiti."

the class and in every respect fairly and adequately represent the interests of the class." The memorandum of law noted that the fifteen individual Haitians "have all been 'screened out' and thus are injured by the failure of the INS to observe rules and procedures designed to ensure that no person who is a political refugee will be returned without his consent." The memorandum asserted also that "[a]ll 15 plaintiffs were subjected to the failure of the defendants to comply with INS guidelines for screening asylum claims." The plaintiffs in the Florida Action asserted that the lawsuit fulfilled the requirements for certification as a class action under Fed. R. Civ. P. 23(a) and 23(b)(2).

In an order dated December 3, 1991, the district court in the Florida Action determined without reference to a specific provision of Fed. R. Civ. P. 23, that the second amended complaint could be maintained as a class action. In another order issued that same day, the district court ruled that to the extent that the Florida Action plaintiffs alleged that the interdiction anud repatriation activities of the Florida Action defendants violated the fifth amendment of the Constitution, those claims "must fail."[4] Thereafter the Eleventh Circuit, *inter alia*, vacated the injuctive orders of the district court issued December 20 and December 23 and remanded with instructions to dismiss the complaint, whereupon the plaintiffs in the Florida Action petitioned the United States Supreme Court for a writ of certiorari. The defendants, in the Florida Action, in a brief submitted to the Supreme

[4] This portion of the district court's order was not appealed. *See Baker*, 953 F.2d at 1503-04.

Court in opposition to the Florida Action plaintiffs' petition for a writ of certiorari stated:

> Under current practices, any aliens who satisfy the threshold standard are to be brought to the United States so that they can file an application for asylum under Section 208(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1158 (a). These "screened in" individuals then have the opportunity for a full adjudicatory determination of whether they satisfy the statutory standard of being a "refugee" and otherwise qualify for the discretionary relief of asylum. Any aliens who are initially "screened in" but ultimately not granted asylum are then to be returned to their country of origin, consistent with procedures afforded under the INA.

The petition for certiorari was denied by the Supreme Court on February 24, 1992. *Baker*, 112 S. Ct. at 1245. Five days later, INS General Counsel Grover Joseph Rees issued a memorandum regarding the processing of "screened in" Haitians on Guantanamo Bay who were excludable for admission to the United States by virtue of having a communicable disease of public health significance.[5] The memorandum directed

[5] Section 1182(a)(1)(A)(i) of 8 U.S.C. provides that aliens who have a communicable disease of public health significance (in accordance with regulations prescribed by the Secretary of Health and Human Services) are excludable. The Attorney General may waive the application of this section to any alien who is the spouse, unmarried son or daughter, or minor lawfully adopted child of a United States citizens, or of a lawfully admitted alien, or to an alien issued an immigrant visa. 8 U.S.C. § 1182(g)(1)(A). The Attorney General may waive the application of § 1182(a)(1)(A)(i) to any alien who has

that the "screened in" Haitians be re-interviewed to determine "whether he or she is a refugee within the definition of INA § 101(a)(42)" and thus might warrant parole into the United States for asylum processing.[6]

On March 18, 1992, the present suit was commenced in the Eastern District of New York. The complaint alleged, *inter alia*, that the first amendment rights of the Haitian Service Organizations—which does not include the Haitian Refugee Center, Inc., which was a party in the Florida Action—were being violated. The complaint also alleged that the New York Action defendants had violated the plaintiffs' right to obtain counsel or to communicate with retained counsel in pursuing their claims for political asylum in contravention of the first and fifth amendments, and that the New York Action defendants had denied the detained Haitians equal protection of the laws "by creating and operating an unauthorized separate and unequal, asylum track for Haitians only." The complaint sought, *inter alia*, an order requiring the defendants "to transport all 'screened in' plaintiffs expeditiously to the United States so that they may be accorded asylum hearings with the full panoply of statutory rights." The complaint also sought a

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a son or daughter who is a United States citizen, or to an alien who has been issued an immigrant visa. 8 U.S.C. § 1182(g)(1)(B).

[6] The appellees assert that this second interview will gather information that will inform the Attorney General's discretionary decision under 8 U.S.C. § 1157(c)(3) on whether to waive the medical exclusion to an otherwise excludable alien for humanitarian concerns. In order to be eligible for waiver of the medical exclusion the alien must be a "refugee." *See* 8 U.S.C. § 1157(a)(3).

declaratory judgment that the New York Action defendants' alleged practices violated, *inter alia*, the first and fifth amendments to the United States Constitution. The New York Action plaintiffs moved for class certification, with respect to the following classes of plaintiffs: "[a]ll Haitian refugees who previously [were] 'screened in' and [were] detained on Guantanamo"; "[a]ll Haitian refugees who [had] retained plaintiff Haitian Service Organizations as counsel, who [might] retain plaintiff organizations as counsel in the future, or who [had] the right to obtain assistance of counsel from other persons"; "[a]ll Haitian refugees who [were] awaiting screening or who [had] been 'screened out' and currently [were] awaiting forcible repatriation, while being detained within territory subject to U.S. jurisdiction; and all lawful permanent residents and citizens living in the United States who were also immediate close relatives of members of any of the above classes who had not been permitted to associate with their relatives because of actions of the New York Action defendants.

In the April 7 order, the district court conditionally certified as a class the "screened in" plaintiffs under Fed. R. Civ. P. 23(b)(2) and rejected the defendants' contention that the doctrine of *res judicata* bound the "screened in" plaintiffs from litigating this suit. The district court observed that in the Florida Action the motion for class certification was granted without a hearing and without amending the class definition and that the subject Haitians received neither notice nor an opportunity to opt-out. The district court noted that according to the Florida Action plaintiffs' description of the class in their memorandum of law in

support of the motion for class certification, the class of Haitian plaintiffs in the Florida Action were "screened out" Haitians. The court found that the "screened in" plaintiffs, the "immediate relative" plaintiffs and the Haitian Service Organizations were new parties and not bound by the outcome of the Florida Action. The court did find, however, that the "screened out" plaintiffs in the New York Action were not a new class and that, consequently, these plaintiffs were bound by the outcome of the Florida Action and that their claims were barred under *res judicata*.

The district court in the New York Action also determined that *res judicata* was inapplicable because the conduct about which the new parties complained had not arisen at the time of the Florida Action. More specifically, the district court concluded that the "INS policy of conducting second interviews to determine whether Haitians carrying the HIV virus have a well founded fear of persecution was developed after the [Florida Action] ended" and that "only recently have the Haitian aliens sought the assistance of counsel." The district court found that the "screened in" plaintiffs' statutory right to counsel, first amendment and fifth amendment due process and equal protection claims were new, that the Haitian Service Organizations' first amendment claim was new and that as a new class all the "immediate relative" plaintiffs' claims were new.

On appeal, the appellants argue that the "screened in" plaintiffs herein were members of the class that was certified in the Florida Action and that their fifth amendment claims are barred by the doctrine of collateral estoppel. We disagree.

"[U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation. Basic principles of res judicata (merger and bar or claim preclusion) and collateral estoppel (issue preclusion) apply. . . . A judgment in favor of either [the plaintiff class or the defendant] is conclusive in a subsequent action between them on any issue actually litigated and determined, if its determination was essential to that judgment." *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) (citations omitted).

For the reasons discussed hereinbelow, we conclude that the class defined in the Florida Action was overly broad, that the issues presented in the present suit were not actually litigated or determined in the Florida Action and thus we decline to apply the doctrine of collateral estoppel to the "screened in" plaintiffs' fifth amendment claims.

It cannot be said that the "screened in" plaintiffs' fifth amendment claims were fairly and adequately represented within the meaning of Fed. R. Civ. P. 23 (a)(4) in the Florida Action. The Florida Action plaintiffs alleged that the Florida Action defendants' practices of forcibly returning interdicted persons to Haiti violated the fifth amendment to the United States Constitution in that the defendants in the Florida Action did not comply with the guidelines promulgated by the INS pursuant to the Executive Order. In moving for class certification, the plaintiffs in the Florida Action presented fourteen "screened out" persons as representative members of the class. However, when the class was certified in the Florida Action, it was the INS' announced policy

to bring "screened in" Haitians to the United States so that they could file an application for asylum. In fact, since the interviews conducted by United States officials already had determined that numbers of Haitians had a "credible" fear of persecution, resulting in their being "screened in," it is not at all likely that the "screened in" Haitians would have alleged that the "interview [they were] afforded . . . was inadequate to allow [them] to meaningfully assert [their] claim for asylum," as the "screened out" Haitians had alleged in the second amended complaint. Despite the broadly defined class and potentially conflicting interests of the members in the purported class in the Florida Action, the class definition was not modified by the district court prior to granting class certification, although "the presence of antagonistic interests within [a Rule 23(b)(2)] class can be handled by redefining the class or creating subclasses under Rule 23(c)(4)." Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*: Civil § 1775 at 457 (2d ed. 1986).

We are aware that Rules 23(b)(2) and 23(d)(2) do not require notice to allow a class member an opportunity to opt-out of a class action suit. *See Penson v. Terminal Transport Co., Inc.*, 634 F.2d 989, 993-94 (5th Cir. Unit B 1981). Nonetheless, in this case we note that

> an over-broad framing of the class may be so unfair to the absent members as to approach, if not amount to, deprivation of due process. . . . [¶] Some of the difficulty may be sifted out by findings of the trial court at or during the trial that the plaintiffs adequately represents the class. But this issue itself may be determined in the absence

> of 99.9% of those affected, who have had no notice or service of process or right to be heard and who may feel that the plaintiffs in the particular case (or his counsel, or both) is the last person they want representing them.

Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126-27 (5th Cir. 1969) (Godbold, J., specially concurring) (footnote omitted). When there is a "strong community of interests" between plaintiffs in a prior suit and plaintiffs in a subsequent suit in that same court

> [t]he proper balance between the public policy of requiring a finality to judgments which settle issues in litigation and that of preventing [violation of the legal right of a subsequent class of plaintiffs who file suit] after such a judgment has been rendered may be achieved by applying the rule of "issue preclusion."

Bronson v. Board of Ed. of the City Sch. Dist. of Cincinnati, 525 F.2d 344, 349 (5th Cir. 1975) (citations omitted), *cert. denied*, 425 U.S. 934 (1976). However, in this case the "community of interests" between the "screened in" plaintiffs in the New York Action and the plaintiffs in the Florida Action is not sufficiently strong to warrant preclusion. The plaintiffs in the Florida Action sought to enjoin the return of interdicted "screened out" Haitians to Haiti, whereas in this suit the plaintiffs in the New York Action apparently seek to enjoin the defendants from repatriating "screened in" Haitians without transporting them "to the United States so that they may be accorded asylum hearings with the full panoply of statutory rights." As previously noted, it is not likely

that the "screened in" Haitians, who had been determined to have a "credible" fear of persecution, would have challenged the interview they were afforded in the same manner that the "screened out" Haitians had in the second amended complaint in the Florida Action. Moreover, the New York Action plaintiffs challenge conduct that was "not in existence at the time of the judgment in [the Florida Action] and could not have been extinguished by it." *Id.* The district court found, and we agree, that the second interview procedures outlined in the February 29, 1992 Rees memorandum constitutes a material change in the INS' policy toward "screened in" Haitians from the INS' previous policy of bringing "screened in" aliens to the United States for asylum proceedings. We conclude that the doctrine of collateral estoppel does not apply to the "screened in" plaintiffs' fifth amendment claims.

Preliminary Injunction

Our standard of review for the issuance of a preliminary injunction is whether such issuance constitutes an abuse of discretion. Applying legal standards incorrectly or relying upon clearly erroneous findings of fact may constitute an abuse of discretion. *Resolution Trust Corp. v. Elman*, 949 F.2d 624, 626 (2d Cir. 1991).

"The standard for issuing a preliminary injunction is well-settled in this Circuit. . . . The party seeking the injunction must demonstrate (1) irreparable harm should the injunction not be granted, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly

toward the party seeking injunctive relief." *Id.*; *see Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979) (per curiam).

In the April 7 order, the district court found that the New York Action plaintiffs had demonstrated the threat of irreparable harm should the injunction not be granted and sufficiently serious questions as to the merits of their claims under the first and fifth amendment, and that the balance of the hardships tipped decidedly in their favor. In response to a motion by the New York Action defendants, the district court, on April 8, 1992, noted that it had applied the proper standard in granting the preliminary injunction. Nevertheless, the district court also found that the "likelihood of success on the merits" standard was met as well. On appeal, the appellants argue that the "serious questions" prong of the preliminary injunction standard is not available when the movant seeks to enjoin "actions taken by government officials in the fulfillment of their public duties." Based upon this assertion, the appellants claim that the district court applied the incorrect standard in its April 7 order. We disagree.

The appellants rely primarily upon *Medical Soc'y of the State of New York v. Toia*, 560 F.2d 535 (2d Cir. 1977) and *Union Carbide Agric. Prod. Co., Inc. v. Costle*, 632 F.2d 1014 (2d Cir. 1980), *cert. denied*, 450 U.S. 996 (1981). We believe both *Medical Soc'y* and *Union Carbide* are distinguishable from the present case. In both *Medical Soc'y* and *Union Carbide*, private litigants sought to enjoin a government agency from taking action in the public interest authorized by a specific statute. *See Medical Soc'y*, 560 F.2d at 537 (recipients of Medicaid and physicians

sought to enjoin state agencies from implementation and enforcement of New York Soc. Serv. Law § 365-a (5)(a),(b),(c) and (e) (McKinney Supp. 1976-77); *Union Carbide*, 632 F.2d at 1016 (producers of pesticide chemicals sought to enjoin enforcement of certain provisions of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136a(c)(1)(D) and 136h(d) (Supp.II 1978)); *see also Plaza Health Lab., Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989) (citing *Medical Soc'y* and *Union Carbide* and stating district court should not apply less rigorous standard where "moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme").

The appellants assert that their conduct at issue at Guantánamo Bay "is plainly taken pursuant to Congress' broad grant of authority in the INA." By this argument, the appellants apparently "assume[] that the public interest [rests] solely with it." *See Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980). We believe that in litigation such as is presented herein, no party has an exclusive claim on the public interest. *See Almonte v. Pierce*, 666 F. Supp. 517, 526 (S.D. N.Y. 1987). We thus believe that *Medical Soc'y* and *Union Carbide* are not applicable herein. Further, the "likelihood of success" prong need not always be followed merely because a movant seeks to enjoin government action. *See Mitchell v. Cuomo*, 748 F.2d 804 (2d Cir. 1984) (Friendly, J., dissenting); *see also, e.g., Hudson River Sloop Clearwater, Inc. v. Department of the Navy*, 836 F.2d 760, 763 (2d Cir. 1988) (per curiam); *Patton v. Dole*, 806 F.2d 24, 28-30 (2d Cir. 1986); *Patchogue Nursing Center v. Bowen*, 797 F.2d 1137, 1141-42 (2d Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987).

1. Irreparable Harm

In the April 7 order, the district court concluded, *inter alia*, that the "screened in" plaintiffs had established by a preponderance of the evidence that irreparable harm would result should the preliminary injunction not be granted. The court found that the "screened in" plaintiffs "may face torture [and] death if they lack access to counsel, fail in their bids to receive asylum, and are repatriated to Haiti."[7] As this conclusion was based upon the district court's findings of fact, and is supported by the record, we do not believe that the district court erred in its findings of irreparable harm. *Cf. Nunez v. Boldin*, 537 F. Supp. 578, 587 (S.D. Tex.) ("Deportation to a country where one's life would be threatened obviously would result in irreparable injury."), *dismissed without opinion*, 692 F.2d 755 (5th Cir. 1982).

2. Serious Questions Going to the Merits

One of the crucial issues presented herein is whether aliens interdicted on the high seas by the United States Coast Guard, who have been found by the government's representatives to have a "credible" fear of persecution on account of "membership in a particular social group[] or political opinion," and are then forcibly detained by United States governmental authorities on property that is under the exclusive control of the United States government, may avail themselves of the due process clause of the fifth

[7] In its opinion and order granting a temporary injunction, the district court stated "[a]ccording to the plaintiffs, aliens are three times more likely to receive asylum in an exclusion or deportation hearing, and twice as likely to success [sic] in an affirmative asylum claim when represented by counsel."

amendment. The unique facts of this case—namely, the interdiction of plaintiffs by United States officials, the status of the territory upon which they are detained, and the "credible" asylum claim they have already been found to possess—lead us to believe that the district court properly issued a preliminary injunction upon finding that there were serious questions going to the merits of the "screened in" plaintiffs' fifth amendment claims.

The district court found that there were serious questions going to the merits of the Haitian Service Organizations' first amendment claim and as part of the preliminary injunction ordered the defendants to permit the Haitian Service Organizations to have immediate access to the "screened in" Haitians on Guantánamo Bay subject to reasonable time, place and manner restrictions. At this point in these proceedings, we need not and do not address the first amendment claim of the Haitian Service Organizations. However, as discussed below, we vacate that portion of the injunction ordering the defendants to allow the Haitian Service Organizations immediate access to the "screened in" Haitians on Guantánamo Bay, although we agree with the remainder of the district court's order.

Judicial review of immigration and naturalization matters is limited. Article I, section 8, clause 4 of the United States Constitution grants Congress the power to "establish a uniform Rule of Naturalization," and the Executive Branch of the federal government has inherent sovereign power to regulate in the immigration field. *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). The Supreme Court has stated that " 'the power to expel or exclude aliens [is] a fundamental sovereign

attribute exercised by the Government's political departments largely immune from judicial review.' " *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)) (citations omitted).

Pursuant to its constitutional authorization, Congress has enacted the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101-1557 (1988). The INA delegates decisions regarding the naturalization of persons to the discretion of authorities in the Executive Branch.

We first look to whether "aliens," which the INA defines as "any person not a citizen or national of the United States," 8 U.S.C. § 1101(a)(3), have any rights under the INA. The Supreme Court has stated that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application," *Landon v. Plasencia*, 459 U.S. 21, 32 (1982), and that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Knauff*, 338 U.S. at 544.

The applicability of the INA is expressly limited to "an alien physically present in the United States or at a land border or port of entry." *See* 8 U.S.C. § 1158(a). The Haitians in this case were interdicted on the high seas and are being held at Guantánamo Bay, Cuba. They are neither physically present in the United States, as defined in the INA, *see* 8 U.S.C. § 1101(a)(38), nor at a port of entry of the United States, see 8 U.S.C. § 1225; 8 C.F.R. §§ 100.4(c), 235.1(a). Therefore, the district court correctly determined that Congress and the Executive Branch have not authorized a procedure under the INA and

the regulations promulgated thereunder that applies to the subject interdicted and "screened in" Haitians detained on Guantánamo Bay.

Notwithstanding the limited scope of judicial review in immigration and naturalization matters, the Supreme Court has indicated that a court may review the procedures employed by the government in an immigration setting to assure that the procedures appropriate under the circumstances comport with constitutional due process, *Landon*, 459 U.S. at 34-35, and the federal judiciary is not precluded from considering whether immigration policies and procedures violate constitutional rights and protections. *Cf. Jean v. Nelson*, 472 U.S. 846, 853-57 (1985).

With the foregoing in mind, we now address the appellees' fifth amendment arguments. The appellees do not contend that the "screened in" plaintiffs have a right to enter the United States. Rather, they claim that the "screened in" plaintiffs have a right, arising under the due process clause of the fifth amendment, not to be deprived of their "liberty" without due process of law. This "liberty" interest, they assert, includes the "freedom not to be sent back to conditions of persecution or death without a fair adjudication that they are not *bona fide* asylees." The appellees claim that such a deprivation of liberty exists independently of any claim to enter the United States.

Noting that the due process clause applies to excludable aliens held at INS detention centers in the United States, the appellees assert that the unique status of the "screened in" plaintiffs warrants even greater due process protections than those afforded excludable aliens in the United States. They argue that, unlike most aliens detained at INS detention

facilities, INS officials already have found that the "screened in" plaintiffs have a "credible" fear of political persecution if returned to Haiti.[8] As further indications of their unique situation, appellees allege that Guantánamo Bay is unlike virtually all other United States military establishments on foreign soil because it is subject to the exclusive jurisdiction and control of the United States, and point out that United States laws apply there. We further note that the district court found that "[n]o detainee in custody is free to go to any country other than Haiti even at their own expense."

The appellees claim that as "de facto asylees" the "screened in" plaintiffs have liberty and property interests in not being returned to Haiti without a fair and adequate adjudication of their asylum applications. They also claim that the detention of the "screened in" plaintiffs, without access to counsel, effectively leaves them exposed to and unable to challenge any illegal attempts to return them to Haiti, notwithstanding United States commitments made in its 1981 agreement with the then-existing government of Haiti.[9]

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[8] At oral argument before this Court, the appellees pointed out that if the asylum proceedings were conducted in the United States (as the government had done during the previous decade of the Haitian interdiction program and promised to do when the Haitians herein were initially detained), the "screened in" plaintiffs could receive the assistance of counsel and would enjoy a statutory right to appeal an adverse ruling on their asylum application.

[9] Appellees further maintain that it cannot be gainsaid that as excludable aliens "screened in" plaintiffs have a funda-

In reply, the appellants claim that extensive United States control over Guantánamo Bay, does not entitle the interdicted Haitians to greater constitutional protections than those afforded aliens who have actually entered the United States. It contends that determinations with respect to refugee status are routinely made at locations abroad, for example, visa applicants at an embassy have no procedural rights regarding their applications.[10] The appellants argue that since the detained Haitians have not "entered" the United States within the meaning of 8 U.S.C. § 1158(a), they are not enttiled to any protections under the due process clause. When inquiry was made at oral argument before this Court, the appellants stated that the "screened in" plaintiffs had no right to attorneys even if they had been subjected to physical abuse on Guantánamo Bay, although appellants speculated that in order to address such conduct the "screened in" plaintiffs possibly had rights and remedies under international law and under local rules and regulations established by the authorities at Guantánamo Bay.

Our review of the unique facts and circumstances of this case leads us to conclude that, in addition to a proper finding of irreparable harm, the district court correctly found that there are serious questions going

mental right to challenge their conditions of confinement. They assert that as detained persons who are "being held incommunicado, without the right to leave Guantanamo, and without recourse if subjected to misconduct or aribtrary action," access to counsel is essential to address any possible violations of the "screened in" plaintiffs' due process rights to assure humane and adequate conditions of confinement.

[10] *See, e.g., Wan Shih Hsieh v. Kiley*, 569 F.2d 1179, 1181 (2d Cir.), *cert. denied*, 439 U.S. 828 (1978).

to the merits of the "screened in" plaintiffs' fifth amendment due process claims and that the balance of the hardships tips decidedly in the "screened in" plaintiffs' favor to warrant the issuance of the injunction, as modified below.

In 1903, the United States and Cuba entered into an "Agreement for the Lease of the United States of Lands in Cuba for Coaling and Naval Stations." Under this lease agreement, the United States was permitted to lease Guantánamo Bay for "coaling or naval stations only, and for no other purpose." The lease agreement provides:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement *the United States shall exercise complete jurisdiction and control over and within said areas* with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.

Agreement for the Lease of the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418 (emphasis added).[11]

[11] The lease agreement was modified and continued in effect by a 1934 treaty between the countries. Treaty between the

Interestingly, both United States citizens and aliens alike, charged with the commission of crimes on Guantánamo Bay, are prosecuted under United States laws. *See United States v. Lee*, 906 F.2d 117, 117 & n.1 (4th Cir. 1990) (per curiam) (appeal from dismissal of indictment of Jamaican national who had been charged with sexual abuse that allegedly occurred on Guantánamo Bay); *United States v. Rogers*, 388 F. Supp. 298, 301 (E.D. Va. 1975) (conviction of civilian employee of company doing work on Guantánamo Bay); *see also* 18 U.S.C. § 7 (defining "special maritime and territorial jurisdiction of the United States" for purposes of United States crimes). During the preliminary injunction hearing before the district court herein, a former commander of the Joint Task Force at Guantánamo Bay Naval Base was called by the appellants and testified concerning two incidents with respect to interdicted Haitians detained on Guantánamo Bay that were consistent with the practice of applying United States criminal law on Guantánamo Bay. The former commander testified that an American sailor was prosecuted and court-martialed for raping a female Haitian alien on the base and, further, that the rape of a female Haitian alien on the base by a male Haitian alien was investigated by the United States Attorney's Office in Norfolk, Virginia.[12]

United States of America and Cuba Defining their Relations, May 29, 1934, art. III, T.S. No. 866. The treaty modification did not change the pertinent provisions of the lease agreement.

[12] We note that although the American sailor was court-martialed apparently in accordance with the Uniform Code of Military Justice, 10 U.S.C. §§ 801-935, a federal law to which he voluntarily submitted upon joining the armed forces, there is no indication that the male Haitian similarly voluntarily submitted to be prosecuted under United States law.

As the district court noted, the language of the fifth and fourteenth amendments does not suggest that they apply only to areas fitting a circumscribed definition of the United States. Guantánamo Bay is a military installation that is subject to the *exclusive* control and jurisdiction of the United States. The Supreme Court has recently reaffirmed that fundamental constitutional rights are guaranteed to inhabitants of territory where the United States has sovereign power. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) ("Only 'fundamental' constitutional rights are guaranteed to inhabitants of [unincorporated] territories [not clearly destined for statehood].") In its later discussion of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which involved convicted, enemy aliens in occupied territories outside the United States, the Court stated that it "had rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Verdugo-Urquidez*, 494 [U.S.] [*sic*] at 269. We believe the question remains unanswered and raises serious questions going to the merits of appellees' claim that the fifth amendment applies to non-accused, non-hostile aliens held incommunicado on a military base within the *exclusive* control of the United States, namely Guantánamo Bay. It also raises questions such as whether the treatment of civilians and aliens alike, by the authorities on that military base implies that these persons enjoy due process in terms of civil and criminal laws applied there, and, if so, suggests that the "screened in" plaintiffs also must be accorded due process of law, in-

cluding access to attorneys—who in this case appear ready, willing, and able to counsel and assist the Haitian plaintiffs at no expense to the government for their services. Justice Kennedy observed in his concurrence in *Verdugo-Urquidez*, "the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory." *Id.* at 275. (Kennedy, J., concurring). However, the interdicted Haitians are not "some undefined, limitless class of noncitizens who are beyond our territory," they are instead an identifiable group of people who were interdicted by Americans in international waters pursuant to a binding Agreement Between the United States of America and Haiti, and who have been detained on territory that is subject to the exclusive control of the United States. In short, in this case the United States has exercised its "undoubted power . . . to take actions to assert its legitimate power and authority abroad," *id.* at 277, in both interdicting and bringing these Haitians to territory controlled by the United States. It does not appear to us to be incongruous or overreaching to conclude that the United States Constitution limits the conduct of United States personnel with respect to officially authorized interactions with aliens brought to and detained by such personnel on a land mass exclusively controlled by the United States. *See United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979). We note that, in the present case, applying the fifth amendment would not appear to be either "impracticable" or "anomalous" since the United States has exclusive control over Guantánamo Bay, and given the undisputed applicability of federal criminal laws to incidents that occur there and the

apparent familiarity of the governmental personnel at the base with the guarantees of due process, fundamental fairness and humane treatment that this country purports to afford to all persons. *See Verdugo-Urquidez*, 494 [U.S.] [*sic*] at 278 (Kennedy, J., concurring).

It appears from our brief references discussed above that arrested and accused aliens at Guantánamo Bay, Cuba, are subject to United States criminal laws—and it may be shown upon a fuller record that United States civil laws apply to the conduct of all aliens on the base as well—thus, by implication, the due process clause of the fifth amendment applies to them. We believe there is no principled basis for concluding that the "screened in" plaintiffs detained at the base would have fewer substantive rights than these other aliens.

Courts have determined that the due process clause applies to both the statutory asylum procedure employed by the INS, *see Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984), and the treatment of excludable aliens detained within the United States. *See Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 (10th Cir. 1981). Although the INA does not extend to Guantánamo Bay, there is a serious question whether the reach of the Constitution does, and we believe there exist serious questions going to the merits of the appellees' claim that since Guantánamo Bay is under the "complete jurisdiction and control" of the United States, the "screened in" plaintiffs may avail themselves of the protections of the due process clause of the fifth amendment to ensure that United States officials afford them due process.

Finally, we look to the significance of the detained Haitians having been "screened in." An alien is

"screened in" after being found to have a credible fear of returning to his country of origin. According to a November 22, 1991 INS memorandum, a credible fear of returning to the country of origin is defined "as an apprehension or awareness, which appears to be truthful . . . of serious danger or threat of harm on account of race, religion, nationality, membership in a particular social group, or political opinion." The government states in its reply brief that "the decision to screen in a particular migrant is of course an important step in that migrant's effort to obtain entry into the United States . . . ."

The appellees argue that once they are "screened in," i.e., are found to possess a credible fear of returning to their country of origin, the Haitians have a reasonable expectation of not being returned forcibly to a country where they will suffer political persecution without having had a fair adjudication of their asylum applications. Appellees assert that this interest is grounded upon, *inter alia*, the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6,223, T.I.A.S. No. 6,577,[13] the Refugee Act of 1980, the Executive Order and the INS own memoranda.

The United States is a party to the United Nations Protocol Relating to the Status of Refugees, which incorporates Articles 2 to 34 of the 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951), 19 U.S.T. 6,223, T.I.A.S. No. 2,545, and binds the signatories to the Articles of the 1951

[13] We recognize that the Protocol does not grant rights beyond those afforded under this nation's domestic law, *Bertrand v. Sava*, 684 F.2d 204, 219 (2d Cir. 1982), however, the appellees argument is based upon domestic pronouncements, identified above, as well.

Convention. *See Stevic v. INS*, 467 U.S. 407, 416 (1984). Article 33.1 of the 1951 Convention provides:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.

The Refugee Act of 1980 conformed this nation's domestic laws with its treaty obligations under the United Nations Protocol Relating to the Status of Refugees. *Chun v. Sava*, 708 F.2d 869, 870 n.2 (2d Cir. 1983). The Executive Order provides, in part, that "no person who is a refugee will be returned to [the country from which they came] without his consent."

Since the inception of the interdiction program, the INS has contemplated only a single interview of an alien interdicted at sea to determine whether to forward the applicant to the United States for further asylum processing.[14] In the February 29, 1992 Rees

[14] In 1982, the INS procedure provided, in relevant part, "[i]f the interview suggests that a legitimate claim to refugee status exists, the person involved shall be removed from the interdicted vessel, and his or her passage to the United States shall be arranged." In September 1985 the INS policy provided, "[i]f the I&NS Officer finds that the alien has a possible claim to asylum, he will forward the 'question sheet' by cable for advisory opinion from the Department of State, BHRHA. Once the opinion has been given, the I&NS Officer will make the determination to either forward the applicant to the United States, or return him to Haiti." A memorandum dated March 1, 1991 provided, "[a]liens expressing [a] credible fear of returning home should be routed to the United States to formally pursue an asylum claim before an Asylum Officer of the Miami Asylum Office. This standard for trans-

memorandum, the policy of conducting a second interview of "screened in" Haitians detained on Guantánamo Bay was formally announced. According to this memorandum, asylum officers on Guantánamo Bay must find at this second interview that the interviewee has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion, and the second interviews are to "be identical in form and substance, or as nearly so as possible, to those conducted by asylum officers to determine whether asylum should be granted to an applicant already in the United States."

Until recent date, the government's policy has been to interdict boats sailing from Haiti and to transport those interdicted to Guantánamo Bay. Plainly, these appear to have been humanitarian acts consistent with the agreement and Protocol cited above. By these humanitarian actions alone, it does not appear that the legal status of the aliens was altered. However, once interdicted persons have been "screened in" the appellants' conduct would appear to have gone beyond a mere humanitarian function.[15] "Screening

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fer to the United States[] is considerably less than the standard necessary to obtain asylum . . . ." The above-referenced November 22, 1991 INS memorandum did not change that procedure, but attempted to clarify the definition of a "credible fear."

Although these INS memoranda are not regulations and are not entitled to the usual judicial deference, *see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), they are instructive as to how the INS implemented the Executive Order.

[15] This is not to say that the interdicted Haitians have a right to the assistance of counsel during the initial "screening" interview.

in" a Haitian alien implicates the Agreement Between the United States and Haiti, the Refugee Act of 1980, the Executive Order and the Protocol, to which we are a signatory. These affirmative actions by the Executive Branch and Congress can fairly be said to have established a reasonable expectation by the "screened in" plaintiffs in not being wrongly repatriated; we believe this expectation to be protected by the due process clause. *Cf. United States ex rel. Paktorovics v. Murff*, 260 F.2d 610, 614 (2d Cir. 1958) (Hungarian's acceptance of invitation to migrant [*sic*] to United States, pursuant to announced foreign policy of United States, offered by President in speech, effected a change in Hungarian's status to entitle him to protection of the Constitution). Upon being "screened in," the Haitian aliens' fundamental legal and human rights status is changed vis-à-vis the United States government. Once "screened in"—that is, found by the governmental officials to have a credible fear of persecution if returned to Haiti—the plaintiffs are entitled to due process prior to United States officials altering their now-different status. *See Chun*, 708 F.2d at 877. In *Chun*, this court determined that "a refugee who has a 'well-founded fear of persecution' in his homeland has a protectable interest recognized by both treaty and statute, and his interest in not being returned may well enjoy some due process protection . . . ." Although "screening in" a Haitian alien results in an apparent change in that alien's status, this change, of course, does not determine whether the alien is a "refugee" or is entitled to "enter" into the United States. However, we believe that the altered status of the Haitian alien does mean that the process thereafter employed by the United States with respect to determining the aliens "refugee"

status should accord with some degree of due process protection.

The district court preliminarily found that the "screened in" plaintiffs were "de facto asylees" and that they could avail themselves of the due process clause of the fifth amendment to challenge the restrictions and the related conduct of the United States government officials. We agree, based upon the unique facts and circumstances of this case.

The change in the operation of the interdiction program by the Rees memorandum, which authorizes a "de facto" asylum proceeding at Guantánamo Bay "identical in form and substance" to one conducted in the United States, the continued detention of the Haitians on property that is subject to the exclusive control of the United States, and the INS' own finding that these Haitians possess "credible" fears of persecution if returned to Haiti, taken together, support the conclusion that there are serious questions going to the merits of the appellees' claim that the "screened in" plaintiffs may avail themselves of the due process clause of the fifth amendment. Permitting access to attorneys is a reasonable method to insure that the "screened in" plaintiffs are not wrongly repatriated to a country in which they have already been found by our government to have a credible fear of being persecuted.[16]

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[16] One commentator has noted with respect to the interdiction program with Haiti:

> Interdiction represents a radical departure from normal inspection and inquiry procedures which afford an alien the opportunity to present his or her case, through counsel, to an immigration judge. As to refugees, interdiction runs afoul of the obligations under the domestic withholding provision and its international law correlative—Article 33 of the Protocol relating to the Status of Refugees—to refrain from refoulement. This is the duty not to expel or return a refugee to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.
>
> A refugee who would otherwise undergo persecution might be returned upon interdiction without any recourse simply because of an inability to articulate the reasons feared, or to persuade an on-ship inspector that the fear is well-founded, or simply because he or she is afraid to speak to authorities. This is particularly so since there would be no access to counsel under these circumstances.

Arthur C. Helton, *Political Asylum under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. Mich. J.L. Ref. 243, 255 (1984) (footnotes omitted).

Despite these difficulties, herein the "screened in" plaintiffs have articulated reasons that governmental officials have deemed sufficient to establish that the Haitians have a "credible" fear of persecution if returned to Haiti. To now deny access to counsel when the "screened in" plaintiffs will be subjected to an interview "identical in form and substance . . . as one conducted by an asylum officer in the United States" raises questions as to the lawfulness of the government's conduct.

In the INA, Congress has determined that in asylum proceedings, an excludable alien should have the benefit of counsel. In our view, applying due process considerations, the Haitians once "screened in" enter a status akin to being asylees and also should have the advice of counsel.

3. Balance of the Hardships

The application of the "serious questions" portion of the preliminary injunction standard requires this Court to consider whether the district court abused

its discretion in finding that the balance of the hardships tips decidedly in favor of the moving party. "Normally, the purpose of a preliminary injunction is to maintain the *status quo ante* pending a full hearing on the merits. Occasionally, however, the grant of injunctive relief will change the positions of the parties as it existed prior to the grant." *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985) (citations omitted). We conclude that insofar as the district court order *required* the appellants to permit the Haitian Service Organizations to have immediate access to the "screened in" Haitians prior to conducting second interviews or repatriating the Haitians to Haiti, "the controversy [would] have been settled with some finality." *Id.* To avoid that consequence, we vacate that portion of the district court's order.

Confronted with the district court's finding that repatriated Haitians "face political persecution and even death on their return" as compared with the appellants' contention that the "injunction interferes with the ability of the Executive officers to carry out their responsibilities, and therefore threatens to increase the numbers of Haitian migrants fleeing their country in unseaworthy boats,"[17] we have relatively little difficulty in concluding that the district court did not err in finding that the balance of hardships

[17] Appellants assert as well that presentations by counsel are not necessary or helpful and that such presentations may engender delays in the process. Based upon the testimony of two INS officials assigned to Guantánamo Bay, the district court found that "the presence of attorneys during asylum interview on Guntánamo would be useful, feasible, and would not interfere with the interview process." This finding is not clearly erroneous, thus this Court is not entitled to disturb this finding.

tips decidedly in the appellees' favor. *See Mitchell*, 748 F.2d at 808. In balancing the hardships, we are aware that the government's assertion that Guantánamo Bay is an active military base is essentially uncontroverted. We recognize that the courts are not privy to the international, national and internal security concerns that are the proper concern of the Executive Branch and, also, that logistical problems will necessarily arise if attorneys are ordered onto the base. Of importance, the injunction, as modified below, preserves the *status quo* pending further proceedings in the district court, and at the same time the movants avoid being irreparably injured.[18] The injunction is affirmed, as modified, and the district court should immediately take steps to expedite the trial process.[19]

CONCLUSION

In light of the above, to the extent consistent herewith, we affirm the district court's issuance of the preliminary injunction. However, we vacate so much of the preliminary injunction as requires the appel-

[18] The public interest in having United States personnel comply with the Constitution is yet another reason to affirm the district court's order.

[19] To the extent that the likelihood of success on the merits prong applies, we are inclined to agree with the district court's April 8, 1992 finding that the plaintiffs in the New York Action have met this standard as well. As discussed more fully above, the "screened in" plaintiffs have demonstrated that they will likely succeed on the merits of their fifth amendment claims because they were interdicted by the New York Action defendants in international waters, were found to have a credible fear of political persecution if returned to Haiti, and are being detained on land under the exclusive control of the United States.

lants to allow the "screened in" Haitian plaintiffs to have access to attorneys at Guantánamo Bay, but we uphold the order insofar as it enjoins the appellants from processing any further at Guantánamo Bay those Haitians who have already been "screened in" and we uphold the order enjoining the appellants from repatriating any such "screened in" Haitians without, in each instance, providing them access to attorneys through the Haitian Service Organizations or otherwise. The appellants are free, of course, to transport such persons to the United States or to any Congressionally designated port of entry where counsel may be available for the "screened in" Haitian applicants.

Affirmed, as modified.

MAHONEY, *Circuit Judge*, dissenting:

I respectfully dissent.

The majority holds that the interdiction by United States officials in international waters of individuals seeking illegally to enter the United States; the status of a leased United States naval base at Guantánamo Bay, Cuba; and the initial determination by INS officials that Haitians at Guantánamo Bay may possess credible asylum claims combine to endow such Haitians with Fifth Amendment due process protection, or at least to present serious questions in that regard.[1] I disagree, and accordingly would vacate

[1] Because of the majority's determination as to serious questions going to plaintiffs' Fifth Amendment claim, its opinion does not address the First Amendment claim of the Haitian Service Organizations. If I had occasion to address that issue, I would conclude that there is no right to relief on that claim, in accordance with *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498, 1511-15 (11th Cir.) (per curiam), *cert. denied*, 112 S.Ct. 1245 (1992).

the preliminary injunction ordered by the district court in its entirety.

The Supreme Court "has long held that an alien seeking initial admission into the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *see also Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953) ("The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores."). "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

Furthermore, the determination of procedures concerning the admissibility of aliens is not a power of Congress alone, but is also inherent in the authority of the executive branch to conduct foreign affairs. *Shaughnessy*, 338 U.S. at 543. Congress has vested the Attorney General with almost complete discretion, within numerical limits, to permit immigration of refugees from outside the country's borders. *See* 8 U.S.C. § 157(c) (1988 & Supp. II 1990). Thus, there is generally no right to judicial review for aliens seeking entry to this country. *See Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 971 (9th Cir. 1986) (Congress has power to exclude aliens from entry or prescribe conditions for entry and have

executive branch enforce policy without judicial interference); *Petition of Cahill*, 447 F.2d 1343, 1344 (2d Cir. 1971) (per curiam) (" 'it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.' ") (quoting *Shaughnessy*, 338 U.S. at 543).

Although the majority opinion acknowledges these principles and concedes that the INA does not apply to Haitians at Guantánamo Bay, the majority nonetheless concludes that there are serious questions as to whether the plaintiffs are entitled to the protections of the Fifth Amendment's Due Process Clause. First, the majority opines that the unique nature of Guantánamo Bay—that it is subject to the exclusive control of the United States and that United States criminal laws are applied there—supports the conclusion that these protections might be available to the detained aliens.

The Supreme Court has "rejected the claim that aliens are entitled to Fifth Amendment rights outside the *sovereign territory* of the United States." *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1063 (1990) (emphasis added) (citing *Johnson v. Eisenstrager*, 339 U.S. 763 (1950)). The naval base at Guantánamo Bay is not sovereign territory of the United States. The lease agreement between the United States and Cuba for the naval base expressly states that "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [naval base]." Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418. Accordingly, even though the United States exercises control over the naval base,

the base is not sovereign territory of the United States where the plaintiff aliens are entitled to constitutional protections. Rather, they are accorded such protections only "when they have come within the territory of the United States and developed substantial connections with this country." *Verdugo-Urquidez*, 110 S. Ct. at 1064.

Second, the majority suggests that the application of our criminal laws to the military base means that "by implication, the due process clause of the fifth amendment applies" to the Haitians there. Preliminarily, the fact that United States *citizens* are subject to United States laws does not add any support to the Haitians' claims. *Cf. id.* at 1063 (distinguishing between application of United States laws to citizens and noncitizens abroad). Further, it seems clear that due process protections are available to aliens outside this nation's sovereign territory only in a more limited way that does not impact upon the issues presented for disposition in this case.

Specifically, any party subjected to criminal prosecution under United States laws may well be entitled to constitutional protections *at trial*. *Cf. id.* at 1060 (Fifth Amendment privilege against self-incrimination "is a fundamental trial right of criminal defendants") (citing *Malloy v. Hogan*, 378 U.S. 1 (1964)); *Janvier v. United States*, 793 F.2d 449, 455 (2d Cir. 1986) (sentencing recommendation formerly authorized by 8 U.S.C. § 1251(b) is part of criminal, not deportation, proceeding, so Sixth Amendment right to counsel applies). Thus, if an alien located at Guantánamo Bay were to be prosecuted under United States law, he might well be entitled to some constitutional protections at trial. Any such entitlement, however, is clearly a separate ques-

tion from the issues presented here. *Cf. Verdugo-Urquidez*, 110 S. Ct. at 1060 (distinguishing between trial and nontrial constitutional protections in context of extraterritorial application); *id.* at 1067-68 (Kennedy, J., concurring) (same).

Similarly, I find unpersuasive the majority's view that because "the due process clause applies to both the statutory asylum procedure employed by the INS, *see Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984), and the treatment of excludable aliens detained within the United States," invoking *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987), and *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 (10th Cir. 1981), there is a serious question whether the alien plaintiffs have a due process right to consult with counsel at Guantánamo Bay. *Augustin v. Sava* involved an asylum proceeding conducted within the United States. *Lynch v. Cannatella* held that "excludable aliens . . . are entitled under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials." 810 F.2d at 1374; *see also Correa v. Thornburgh*, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990) ("Other than the protection against gross physical abuse, the alien seeking initial entry appears to have little or no constitutional due process protection."). *Rodriguez-Fernandez v. Wilkinson* ruled that "an excluded alien in physical custody within the United States may not be 'punished' [in that case, imprisoned indefinitely] without being accorded the substantive and procedural due process guarantees of the Fitfh Amendment." 654 F.2d at 1387. I see little assistance in any of these cases for

the resolution of the due process issues presented on this appeal.[2]

Finally, it is the majority's view that once Haitians at Guantánamo Bay have been "screened in," i.e., found to possess a credible fear of returning to Haiti, they should be deemed "de factor asylees" who "have established a reasonable expectation . . . in not being wrongly repatriated . . . [that is] protected by the due process clause." It is clear, however, that the "screening in" of a Haitian alien does not determine whether the alien is a "refugee" or is entitled to admission to the United States, and that the determination of refugee or asylee status rests solely with the appropriate INS officials, and not with this court.

In this case, the initial screening interview is simply one step in the process for an alien interdicted at sea to gain admission into this country. Congress has explicitly authorized the executive to exclude an alien seeking admission who is determined to have a communicable disease. 8 U.S.C. § 1182(a)(1)(A)(i) (Supp. II 1990). It accordingly seems curious that a second screening interview of an individual located outside this country, designed to gather information that might aid the Attorney General in reaching a determination whether to exercise his discretion and waive the exclusion, *see* 8 U.S.C. § 1157(a)(3) (1988), would run afoul of the Constitution. Nor is a serious constitutional question presented, as I see it, be-

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[2] I note in this connection the district court's finding that "[n]o detainee in custody is free to go to any country other than Haiti even at their [sic] own expense." The government has represented that the detainees are free to go to any country that will accept them, but that acceptances have not been forthcoming. I am unaware of any reason to disbelieve that representation.

cause the INS initially conducted a single-interview process with respect to the "screening in" of the Haitians at Guantánamo Bay, but subsequently determined to conduct a second interview of those determined to have a communicable disease.

For all the foregoing reasons, plaintiffs-appellees have not established, in my view, either a likelihood of success on the merits or the existence of serious questions going to the merits with respect to their Fifth Amendment due process claims. I would accordingly vacate the preliminary injunction in its entirety.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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92 CV 1258

HAITIAN CENTERS COUNCIL, INC., ET. AL., PLAINTIFF,

- against -

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET. AL., DEFENDANT.

MEMORANDUM AND ORDER

[Filed Mar. 27, 1992]

Johnson, District Judge:

This cause of action arises on the application of the following (hereinafter "the Plaintiffs"): Haitian Centers Council, Inc., National Coalition for Haitian Refugees, Inc., Immigration Law Clinic of the Jerome N. Frank Legal Services Organization, (the "Haitian Service Organizations"), Dr. Frantz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, and Roges Noel on behalf of themselves and all others similarly situated (the "Screened In Plaintiffs")[1]; A. Iris Vilnor

[1] Throughout this opinion, reference will be made to so-called "screened in" and "screened out" Haitian aliens. For purposes of this opinion, "screened in" individuals include

on behalf of herself and all others similarly situated (the "Screened Out Plaintiffs"); and Mireille Berger, Yrose Pierre and Mathieu Noel on behalf of themselves and all other similarly situated (the "Immediate Relative Plaintiffs") for a Temporary Restraining Order pursuant to F.R.C.P. 65. The defendants in this action are Gene McNary, Commissioner, Immigration and Naturalization Service; William P. Barr, Attorney General; Immigration and Naturalization Service; James Baker, III, Secretary of State; Rear Admiral Robert Kramek and Admiral Kime, Commandants, United States Coast Guard; and Commander, U.S. Naval Base, Guantanamo Bay (collectively, the "Defendants" or the "Government"). Plaintiffs seek to restrain the Defendants from:

1) denying plaintiff Haitian Service Organizations access to their clients for the purpose of providing such clients legal counsel, advocacy, and representation;

2) interviewing, screening, or subjecting to exclusion or asylum proceedings any Haitian citizen currently being detained on Guantanamo, on Coast Guard cutters, or in territory subject to United States jurisdiction who is being denied or has been denied his or her right to communicate with counsel; and

3) returning to Haiti any Haitian citizen currently detained at Guantanamo, on the Coast Guard cutters, or in territory subject to U.S. jurisdiction, who has

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Haitian aliens who satisfy the threshold standard for refugee status and are to be brought to the United States so that they may file an application for asylum under the Immigration and Nationality Act ("INA") and "screened out" individuals include Haitian aliens who do not meet the threshold standard for refugee status and who will be repatriated to Haiti.

been "screened-out" without the benefit or advice of counsel.

BACKGROUND

In December 1990, the country of Haiti held its first fully democratic elections in over 200 years and elected Jean Bertrand Aristide as President. On September 30, 1991, President Aristide was overthrown in a military coup and thousands of Haitians attempted to escape the country's upheaval by fleeing onto the high seas in boats. The United States Coast Guard began interdicting an increasing number of vessels carrying Haitian refugees on the open seas.[2] The United States temporarily suspended it program of repatriation of interdicted Haitians. On November 18, 1991, the United States announced it had begun the forced return of refugees who were "screened out" by the Immigration and Naturalization Service ("INS") had determined not to be entitled to political asylum.[3]

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[2] On September 23, 1981, Haiti and the United States entered into a cooperative agreement (the "Agreement") to prevent the illegal migation of aliens without visas from entering the United States. Interdiction Agreement, Sept. 23, 1981, United States-Haiti, T.I.A.S. No. 10241. Under the Agreement, the United States may board Haitian flag vessels on the high seas for the purpose of making inquiries relating to the condition and destination of the vessels and the status on board. If a violation of United States or Haitian law is ascertained, the vessel and its passengers may be returned to Haiti. The Agreement also explicitly provides that it is "understood that . . . the United States does not intend to return to Haiti, any Haitian migrants whom the United States authorities determine to qualify for refugee status."

[3] According to the Defendants, as of March 19, 1992, the disposition of the interdiction and repatriation program is as follows:

a. *The Baker Litigation*

The following day, the Haitian Refugee Center (hereinafter "HRC") and individual Haitian refugees (hereinafter "Named Haitian Plaintiffs") on behalf of themselves and all others similarly situated filed a complaint (*Haitian Refugee Center* v. *Baker*, Dkt. No. CV-91-2635, S.D. Fla.) (hereinafter "*Baker*") for Declaratory Judgment and Injunctive Relief, and an Application for Temporary Restraining Order (the "First TRO") in the United States District Court for the Southern District of Florida. The defendants named therein were James Baker, III, Secretary of State; Rear Admiral Robert Kramer and Admiral Kime, Commandants, United States Coast Guard; Gene McNary, Commissioner, Immigration and Naturalization Service; The United States Department of Justice; Immigration and Naturalization Service; and The United States of America.

Following a *ex parte* hearing on November 19, 1991, the Florida district court issued the First TRO which directed the defendants to restrain "from continuing to repatriate Haitians currently on board U.S.-flagged vessels and Haitians currently being held on land under United States' control and at Guantanamo Bay, Cuba." On December 3, 1991, the district court issued an order granting preliminary

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—16,464 Haitians have been interdicted

—9,542 Haitians have been repatriated to Port-au-Prince

—3,446 Haitians are ashore at Guantanamo Bay Naval Base

—2,822 Haitians have been brought to the United States to pursue asylum claims

—233 Haitians have been transported to third countries

—0 Haitians are aboard Coast Guard cutters.

injunctive relief specifically enjoining the defendants from "forcefully repatriating the individual plaintiffs or class members in their custody either until the merits of the underlying action are resolved or until defendants implement and follow procedural safeguards adequate to ensure that Haitians with bona fide claims of political persecution are not forcefully returned to Haiti." [4]

The court found that the plaintiffs were likely to succeed on the merits of two judicially enforceable claims: 1) HRC's First Amendment rights of association and to counsel; and 2) the Named Haitian Plaintiffs' right of non-refoulement [5] which arises under Article 33 of the 1967 United Nations Protocol Relating to the Status of Refugees. The court also issued an order stating the action could be maintained as a class action without holding a hearing or altering the class definition. In their Memorandum in Support of Motion for Class Action Certification ("HRC Mem."), the *Baker* plaintiffs defined the class as follows:

> The individual plaintiffs are all Haitian emigres who were intercepted by the United States Coast Guard pursuant to a "program of interdiction"

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[4] *Haitian Refugee Center v. Baker*, No. 91 CV 2635 *Order Granting preliminary Injunctive Relief and Supporting Memorandum Opinion* (S.D.Fla. December 3, 1991).

[5] Article 33.1 of the Convention provides:

> no contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

T.I.A.S. No. 6577 (1968).

> that permits interception and repatriation of undocumented aliens. They are presently being held on Coast Guard cutters and at the U.S. Naval base in Guantanamo. They have all been '*screened out*' and thus are injured by the failure of the INS to observe rules and procedures designed to ensure that no person who is a political refugee will be returned without his consent. *Id.* at 2 (emphasis added).

In other words, the class of plaintiffs involved in they [*sic*] *Baker* litigation were limited to individuals who had already been screened out by INS.

The Eleventh Circuit dissolved this injunction on December 17, 1991 ("*Baker App. I*") and remanded the case with instructions that the Article 33 claim be dismissed on the merits. In *Baker App. I*, the Court of Appeals found that 1) the injunction was overbroad; 2) the relief granted did not address the right of access asserted by the Haitian Refugee Center; and 3) Article 33 of the 1976 United Nations Protocol Relating to Status of Refugees is not self-executing, and thus provides no enforceable rights to Haitians who had not reached United States territory. *Haitian Refugee Center* v. *Baker*, 949 F.2d 1109 (11th Cir. 1991).

The district court subsequently issued another TRO (the "Second TRO") on the plaintiffs' claim that defendants failed to follow the procedural requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. § 555(b), 557, 558 and 702. On December 19, 1991, the Eleventh Circuit deemed the Second TRO a preliminary injunction and stayed it pending appeal on the ground that it was likely that the government would prevail on the merits of the APA claim ("*Baker App. II*").[6]

The following day, the district court entered a preliminary injunction ordering defendants to grant plaintiffs' lawyers access to the interdicted class members. On December 23, 1991, the court entered a second preliminary injunction on the ground that the plaintiffs were likely to succeed on the merits of their APA claim and simultaneously stayed its enforcement pursuant to the Eleventh Circuit's decision in *Baker App. II*.

The Eleventh Circuit Court of Appeals issued a (2-1) *per curiam* opinion on February 4, 1992 ("*Baker App. III*") reversing the District Court's injunction on First Amendment and APA grounds, vacating all District Court orders, and remanding the case with instructions to dismiss because the complaint failed to state a claim upon which relief could be granted.[7] The plaintiffs filed a petition for a writ of certiorari and an accompanying application for a stay of the Eleventh Circuit's mandate in *Baker App. III*. On February 24, 1992, the Supreme Court denied certiorari and petitioners' application for a stay of

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[6] *Haitian Refugee Center* v. *Baker*, 950 F.2d 685 (11th Cir. 1991) ("*Baker App. II*").

[7] The Court of Appeals ruled that aliens who had been interdicted on the high seas and had not presented themselves at United States' borders had no right to judicial review under the Administrative Procedure Act; 2) the executive order providing for interdiction of aliens did not create a private right of action in favor of aliens improperly returned; and 3) Haitian Refugee Center had no First Amendment right to access to aliens lawfully interdicted and detained. *Haitian Refugee Center* v. *Baker*, 953 F.2d 1498 (11th Cir. 1992) ("*Baker App. III*").

the *Baker App. III* mandate. *Haitian Refugee Center v. Baker*, 60 U.S.L.W. 2513 (1992).

Five days after the Supreme Court denied plaintiffs' petition for certiorari in *Baker App. III*, the General Counsel of the INS, Grover Joseph Rees, circulated a memorandum setting forth policy to interview "any person 'screened in' as a possible refugee who has been determined to have a communicable disease that is not curable . . . to determine whether he or she is a refugee." On March 2, 1992, six Screened In Plaintiffs contacted one of the Haitian Service Organizations seeking legal assistance. Nine days later, counsel to the Haitian Service Organizations wrote to the Commissioner of the INS and the Commander of the Guantanamo Naval Base, requesting immediate access to their clients on Guantanamo Bay and Coast Guard cutters off Guantanamo.[8] On or about March 10, 1992, approximately 20 asylum officers arrived at Guantanamo to decide the asylum claims of some of the "screened in" Haitians who have been denied access to counsel and who are now members of the plaintiff class in the instant action.

b. *The Present Action*

On March 17, 1992, the plaintiffs filed an order to show cause with supporting affirmations as an "emergency matter" on this court's Miscellaneous docket which was subsequently referred to the Civil docket and assigned, by random selection, to this court. That same afternoon, this court heard oral argument from both plaintiffs' and defendants' counsel on plaintiffs' application for a temporary re-

[8] According to the plaintiffs, the Haitian Service Organizations have yet to receive a response. See discussion *infra*.

straining order (the "TRO") and their demand for expedited discovery. The following morning, this court heard more oral argument and the plaintiffs filed a complaint seeking declaratory and injunctive relief. During oral argument, the defendants asserted that plaintiffs were wholly precluded from bringing this suit by the prior litigation in *Baker*.

This court took the matter under advisement and requested that the parties brief certain issues related to the TRO. The Defendants filed their Memorandum in Opposition to Plaintiffs' Motion for a Temporary Restraining Order, a Motion to Dismiss pursuant to F.R.C.P. 12(b)(6) for failure to state a claim, and a Motion for Rule 11 Sanctions on March 20, 1992.[9] Plaintiffs filed reply papers on March 23, 1992. After reviewing the papers, the court finds that the plaintiffs' papers raise sufficient questions of law and fact to conclude that the *Baker* litigation does not entirely preclude the present action. As set forth below, the court finds that some of the plaintiffs meet the standards for the immediate issuance of a TRO.

DISCUSSION

a. *Res Judicata*

I. New Parties

The doctrine of res judicata bars relitigation of any claim between two parties where a court has previously entered a final judgment on the merits. *Allen v. McCurry*, 449 U.S. 90 (1980); *Milltex In-*

[9] For the purposes of this TRO, the court will not address Defendants' Motion to Dismiss and Motion for Rule 11 Sanctions as they are premature. In the event that Plaintiffs prevail in the preliminary injunction hearing, the court will then address the merits of these motions by the Defendants.

dustries Corp. v. *Jacquard Lace Co. Ltd.*, 922 F.2d 164 (2d Cir. 1991). Where the subsequent litigation involves new parties and new claims, the action is not barred by *res judicata*. Nonetheless, the doctrine of collateral estoppel precludes litigation of any issue of law or fact that was necessary to the court's judgment in a prior action involving the same party. *Allen* v. *McCurry*, 449 U.S. at 94.

Based on my understanding of the complaint, plaintiff A. Iris Vilnor, who sues on behalf of herself and all others similarly situated, is seeking relief for herself and other Haitians who were "screened out" prior to the *Baker* litigation and who are bound by its outcome. As the complaint's description of this class fails to state whether these individuals were ever screened in, it appears that these class members are not new parties.[10] Thus *Baker* precludes their claims herein.

Of the remaining plaintiffs in the present action, all of the Haitian Service Organizations are new and two of the three plaintiff classes are new parties. The immediate relatives of "screened in" Haitians and all those similarly situated make up an entirely new plaintiff class which was not a party to the *Baker* litigation. In addition, the Haitian plaintiffs in the present action consist of a *new* "screened in" class of refugees who were not included in the *Baker* class. Finally, the Haitian Service Organizations in this

[10] If Plaintiffs are able to establish at the preliminary injunction hearing that this class includes Haitians who were "screened in" prior to and during the *Baker* litigation and therefore were not parties to *Baker*, and since that time have been "screened out," then this court will reconsider its initial conclusion that *Baker* bars them from litigating their claims in this action.

action differ from the plaintiff organization (Haitian Refugee Center) in *Baker*.[11] Therefore, it appears that *res judicata* is inapplicable to the Haitian Service Organizations, the Screened In Plaintiffs and the Immediate Relative Plaintiffs.

II. Subsequent and Changed Conduct

Res judicata is also inapplicable where neither conduct complained of nor the claim had not arisen at the time of the first suit. *Prime Management Co., Inc.* v. *Steinegger*, 904 F.2d 811 (2d Cir. 1990); *N.L.R.B. v. United Technologies Corp.*, 706 F.2d 1254 (2d Cir. 1983); *see generally* Wright, Miller & Cooper, 18 *Federal Practice and Procedure* § 4409 (West 1981). That certainly appears to be true in present action. Plaintiffs' complaint is based upon new circumstances or conduct that occurred after the *baker* [*sic*] litigation and it is such conduct that gives rise to a new cause of action. Specifically, the present complaint alleges that during the *Baker* litigation the defendants represented:

> Under current practice, any aliens who satisfy the threshold standard *are to be brought to the United States so that they can file an application for asylum* under Section 208.02 of the Immigration and Nationality Act (INA), 80 SL sec. IJ8(a). These 'screened in' individuals then have

[11] The government argues that privity should bar the Haitian Service Organizations from bringing this action. On the face of the complaint, this court fails to see any privity relationship or anything which conclusively establishes the existence of privity. If the Government is able to raise an issue of fact as to privity at the hearing on the preliminary injunction, this court will resolve this issue at that time.

> the opportunity for a *full adjudicatory determination* of whether they satisfy the statutory standard of being a 'refugee' and otherwise qualify for the discretionary relief of asylum. Complaint ¶ 34(f) (*citing* Opposition to Certiorari, *Baker App. III*, at 3.).

Five days after the Supreme Court denied certiorari, the INS began implementing procedures to interview or screen individuals who had been "screened in."

Plaintiffs allege that the Screened In Plaintiffs contacted the Haitian Service Organizations seeking legal assistance on March 2, 1992. Plaintiffs learned on March 10th that asylum officers arrived in Guantanamo to begin adjudicating asylum claims of the [*sic*] some of the "screened in." The next day, counsel to the Haitian Service Organizations wrote to defendant McNary and the Commanding Officer of the U.S. Naval Air Station, Guantanamo Bay, requesting access to the Screened In Plaintiffs and the Screened Out Plaintiffs by March 16, 1992. To date, Plaintiffs' counsel has received no response.

Plaintiffs allege that the Government is re-screening and adjudicating asylum claims not only for HIV positive refugees as the government contends but many if not all the "screened in" Haitians on Guantanamo. These re-screenings and adjudications are allegedly being conducted without providing the refugees the opportunity to obtain and communicate with counsel. Presuming the complaint true for present purposes—apecifically [*sic*], that the Government's conduct began subsequent to the *Baker* litigation—it appears that this conduct gives rise to new claims, making *res judicata* inapplicable.

b. *Issuance of a Temporary Restraining Order*

A court may issue an [*sic*] temporary restraining order upon a showing or irreparable harm and for the purpose of preserving the status quo long enough to hold a hearing. *Warner Bros. Inc.* v. *Dae Rin Trading Inc.*, 877 F.2d 1120 (2d Cir. 1989), *citing Granny Goose Foods, Inc.* v. *Brotherhood of Teamsters*, 415 U.S. 423 (1974).

Here, the plaintiffs have made a showing of irreparable harm by a preponderance of the evidence. According to the plaintiffs, aliens are three times more likely to receive asylum in an exclusion or deportation hearing, and twice as likely to success in an affirmative asylum claim when represented by counsel. If the Screened In Plaintiffs on Guantanamo are not afforded asylum, are "screened out" and are ultimately repatriated to Haiti, they face irreparable injury to life and liberty.

Since the military overthrow of President Jean Bertrand Aristide on September 30, 1991, reportedly over fifteen hundred Haitians, many of them supporters of Aristide, have been killed, tortured, or subjected to violence and the destruction of their property because of their political beliefs. Hundreds of people have been detained without warrant or executed extrajudicially. Thousands of people have been forced into hiding.

There are reports that Haitians who have been repatriated since November 1991 are interviewed, fingerprinted and photographed upon their arrival in Port-au-Prince. Apparently, over 200 Haitians who were repatriated from Guantanamo have been imprisoned. The are approximately forty repatriated Haitians who have fled for a second time (also known as "Double-Backers") and are currently being de-

tained on Guantanamo. The Double-Bakers lend further credence to reports of the widespread violence that is occurring. *See, Some Haitians Assert Abuse Forced Second Flight*, N. Y. Times, Feb. 10, 1992 at A1.[12]

Given that at a preliminary injunction hearing the Plaintiffs are likely to prove their assertions that there are new parties and/or new claims in the instant action, the merits of this action will need to be addressed. Serious questions going to such merits are raised by the papers and oral argument so far

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[12] Although the court believes that the only factor that must be satisfied for a TRO is irresparable harm, *see* F.R.Civ.P. 65(b), the court notes that one district court has applied a more stringent standard when a TRO is issued on notice: 1) a showing of irreparable harm and 2) sufficiently serious questions going to the merits making them fair ground for litigation and balance of hardship tipping in favor of the moving party. *See Binghamton City School District* v. *Borgna*, No. 90 CV 1360, 1991 WL 29985 at *4 (N.D.N.Y. March 6, 1991). This court finds no Second Circuit or Supreme Court precedent for the application of this higher standard to this TRO issued on notice.

Were this court obligated to inquire into the second factor, however, it finds that the second prong of such standard has been satisfied. Specifically, although this TRO may increase the government's financial burden, when this cost is balance [*sic*] against the irreparable harm to life and liberty the plaintiffs may face if they lose their bid for asylum and are repartriated, the court concludes that the balance of hardships tip in favor of the plaintiffs. Finally, as to any potential "magnet effect," I find that, at this time, the relief afforded herein is so temporary in nature and narrowly drawn that it should not encourage more Haitians to take to the high seas. In addition, as is discussed more fully in the text above, the court also finds that there are serious questions going to the merits to make them fair ground for litigation.

presented to this court. In particular, I am quite disturbed that the Government asserts that the court lacks the power to restrain conduct by United States officials that is arbitrary, capricious and perhaps even cruel. (*See* Hearing Transcript at p.39) when such conduct occurs on territory that is subject to United States jurisdiction.[13] Worse yet, the Government asserts that this court must sit mute when Congress mandated:

> In any exclusion or deportation proceedings before a special inquiry officer . . ., the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

8 U.S.C.A. § 1362. Additionally, INS's regulations specifically provides that an alien "shall be advised of his right to representation by counsel of his choice at no expense to the Government." 8 C.F.R. § 242.1(c) (1990). In light of the foregoing, serious issues are raised which warrant the issuance of the TRO herein granted and, moreover, a fuller exploration of the merits of this action at a preliminary injunction hearing.

c. *Security*

Defendants demands [*sic*] that plaintiffs to post a $10,0000,000 [*sic*] bond as security. In light of the Government's failure to substantiate its demand for a $10 million bond, the plaintiffs' indigence, and the

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[13] Guantanamo Bay, Cuba is subject to United States jurisdiction. *See* Treaty Between the United States of America and Cuba, Feb. 16, 1903.

important question raised in this case, the court will exercise its discretion and waive the bond. *See United States v. Bedford Associates*, 618 F.2d 904, 916-17 n.23 (2d Cir. 1980).

CONCLUSION

For the foregoing reasons, it is hereby:

ORDERED, that sufficient reason having been shown therefore, pending the hearing for the plaintiffs' application for a preliminary injunction, pursuant to Federal Rule 65, defendants are temporarily restrained and enjoined from:

a) denying plaintiff service organizations access to their clients for the purpose of providing them legal counsel, advocacy, and representation;

b) interviewing, screening, or subjecting to exclusion or asylum proceedings any Haitian citizen currently being detained on Guantanamo, or in any other territory subject to U.S. jurisdiction (I) who has been screened in or who was screened in prior to the *Baker* litigation and has since been screened out and (ii) who is being denied or has been denied his or her right to communicate with counsel; and it is further

ORDERED that expedited discovery be granted, thereby in accordance with the following scheduling order:

(i) defendants' must produce documents for inspection and copying on or before March 31, 1992; and

(ii) plaintiffs are granted leave to serve and depose Defendants o [*sic*] or before April 1, 1992 at 9:00 a.m.; and it is further

ORDERED, that the defendants or their attorneys show cause before The Honorable Sterling Johnson, Jr., United States District Judge, at the United States Courthouse in the Eastern District of New York, 225 Cadman Plaza, Brooklyn, New York, in Courtroom 14 at 9:00 a.m. on April 1, 1992, why an order should not be entered granting Plaintiffs' request for Preliminary Injunction pursuant to Federal Rule of Civil Procedure 65 thereby in accordance with the terms of the TRO issued herein or as otherwise may be deemed just and proper.

So ordered.

/s/ Sterling Johnson, Jr.
United States District Judge

Dated: Brooklyn, New York
March 27, 1992

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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92 CV 1258

HAITIAN CENTERS COUNCIL, INC., NATIONAL COALITION FOR HAITIAN REFUGEES, INC., IMMIGRATION LAW CLINIC OF THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION, OF NEW HAVEN CONNECTICUT; DR. FRANTZ GUERRIER, PASCAL HENRY, LAURITON GUNEAU, MEDILIEU SOREL ST. FLEUR, DIEU RENEL, MILOT BAPTISTE, JEAN DOE, AND ROGES NOEL ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED; A. IRIS VILNOR ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED; MIREILLE BERGER, YVROSE PIERRE AND MATHIEU NOEL ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF,

- against -

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, WILLIAM P. BARR, ATTORNEY GENERAL; IMMIGRATION AND NATURALIZATION SERVICE; JAMES BAKER, III, SECRETARY OF STATE; REAR ADMIRAL ROBERT KRAMEK AND ADMIRAL KIME, COMMANDANTS, UNITED STATES COAST GUARD; AND COMMANDER, U.S. NAVAL BASE, GUANTANAMO BAY, DEFENDANT.

[Filed Apr. 6, 1992]

MEMORANDUM AND ORDER

Johnson, District Judge:

I. *FINDINGS OF FACT*

1. The defendants in this action are Gene McNary, Commissioner, Immigration and Naturalization Service; William P. Barr, Attorney General; Immigration and Naturalization Service; James Baker, III, Secretary of State; Rear Admiral Robert Kramek and Admiral Kime, Commandants, United States Coast Guard; and Commander, U.S. Naval Base, Guantanamo Bay (the "Government").

2. The plaintiffs are the Haitian Centers Council, Inc., the National Coalition for Haitian Refugees, Inc., the Immigration Law Clinic of the Jerome N. Frank Legal Services Organization ("Haitian Service Organizations"); Dr. Frantz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, and Roges Noel on behalf of themselves and all others similarly situated ("Screened In Plaintiffs"); A. Iris Vilnor on behalf of herself and all others similarly situated ("Screened Out Plaintiffs"); and Mireille Berger, Yrose Pierre and Mathieu Noel on behalf of themselves and all others similarly situated ("Immediate Relative Plaintiffs").

3. The Haitian Service Organizations were neither parties to the *Haitian Refugee Center* v. *Baker* ("*Baker*") litigation nor privies of the Haitian Refugee Center.[1] The Immediate Relative Plaintiffs were not parties to the *Baker* litigation.

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[1] For a detailed discussion of the *Baker* litigation, *see Haitian Centers Council, Inc.* v. *McNary, et al.*, No. 92-1258, Memorandum and Order dated March 27, 1992.

4. On September 29, 1981, President Ronald Reagan ordered the Secretary of State "to enter into, on behalf of the United States, cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea." Executive Order No. 12324, 46 F.R. 48109 (1981) *reprinted in* 8 U.S.C.A. § 1182 note (1982) ("Executive Order").

5. Under the cooperative agreement (the "Agreement") entered into by the United States and Haiti, the United States may board Haitian flagged vessels on the high seas for the purpose of making inquiries relating to the condition and destination of the vessel and the status of those on board. Interdiction Agreement, Sept. 23, 1981, United States-Haiti, T.I.A.S. No. 10241. If a violation of United States or Haitian law is ascertained, the vessel and its passengers may be returned to Haiti. The Agreement also explicitly provides that it is "understood that . . . the United States does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status."

6. On September 30, 1991, President Jean Bertrand Aristide was overthrown in a military coup. In the wake of the overthrow, hundreds of Haitians have been killed, tortured, detained without a warrant, or subjected to violence and the destruction of their property because of their political beliefs. Thousands have been forced into hiding. Plaintiffs' Exhibit ("Pl. Ex.") 30.

7. To escape the country's political upheaval, thousands of Haitians began to flee onto the high seas. The United States Coast Guard began interdicting an increasing number of vessels carrying Haitian aliens.

8. As of March 19, 1992, the United States Coast Guard has interdicted 16,464 Haitians and has repatriated 9,542 Haitians to Port-au-Prince.

9. The United States Naval Base at Guantanamo Bay, Cuba is subject to a lease agreement between the United States and Cuba which states that:

> during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas.

Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations. February 16, 1903.

10. The U.S. Naval Base at Guantanamo is a "relatively open base" to which non-military personnel such as military dependents, foreign nationals, contractor employees providing support services, civilian government employees are allowed access. ("Pl. Ex.") 38 at 89-91. The facilities include schools, bars, restaurants, a McDonalds, and a Baskin-Robbins.

11. The United States Coast Guard take [*sic*] Haitian aliens who are interdicted on the high seas into custody and transport [*sic*] them to Guantanamo where they are held incommunicado. Approximately 3,300 Haitian aliens are currently in the custody of the United States at Guantanamo. The Haitians live in camps surrounded by razor barbed wire fences. Haitian detainees who are accused of committing an "infraction" are placed into a separate camp known as "Camp 7." No detainee in custody is free to go to any country other than Haiti even at their own expense. (Preliminary Injunction Hearing Transcript, "P.I." Transcript, at 165. Nor are they permitted to make telephone calls. Although, the military has pro-

vided the Haitian aliens with various services including schools, medical care and religious services, it has denied them access to legal services.

12. Under the interdiction program, INS asylum officers at some point interview interdicted Haitians to determine whether they have a "credible" fear of political persecution if returned to Haiti. Those found to have a "credible" fear are screened in. Those found not to have a "credible" fear are screened out. Haitians who are screened in are to be brought to the United States so that they may pursue asylum claims. To date approximately 2,800 Haitians have been brought to the United States. Haitians who are screened out are repatriated to Haiti.

13. During the *Baker* litigation, the United States government represented that:

> Under current practice, any aliens who satisfy the threshold standard are to be brought to the United States so that they can file an application for asylum under Section 208.02 of the Immigration and Nationality Act (INA), 80 SL sec.ILJ8(a). These 'screened in' individuals then have the opportunity for a full adjudicatory determination of whether they satisfy the statutory standard of being a 'refugee' and otherwise qualify for the discretionary relief of asylum.

Compliant ¶ 34(f).

14. Five days after the Supreme Court denied certiorari in *Haitian Refugee Center* v. *Baker*, 60 U.S.L.W. 2513 (1992) the Government changed this practice. On February 29, 1992, the General Counsel of the INS, Grover Joseph Rees, circulated a memorandum setting forth policy to conduct second interviews of all screened in Haitians who have been found to have a communicable disease.

15. The Government requires that all Haitian aliens who have been screened in by INS asylum officers to undergo medical testing to determine whether they carry the HIV virus.

16. Approximately 200-400 Haitian aliens are suspected of carrying the HIV virus. Screened in Haitians who test positive for the HIV virus must undergo a second INS interview to determine whether they have a "well-founded" fear of political persecution if returned to Haiti. Approximately 200-400 Haitian aliens are suspected of carrying the HIV virus.

17. According to INS policy, the second interviews are intended to be "identical in form and substance, or as nearly so [*sic*] possible, to those conducted by asylum officers to determines [*sic*] whether asylum should be granted to an applicant already in the United States." Pl. Ex. 1.

18. The INS has directed asylum officers to use the usual standards and techniques for asylum interviews as set forth in the INS procedures and operations manuals.

19. The "well-founded fear standard used by INS asylum officers when conducting second interviews of screened in Haitians is identical to that required to grant asylum or refugee status to an individual physically present in the mainland United States.

20. While asylum applicants in the United States may have attorneys present during their asylum interviews, asylum applicants being held in custody on Guantanamo are not permitted to have access to an attorney during their second INS interview.

21. When INS began conducting second asylum interviews, the Haitian aliens including the Screened In Plaintiffs began seeking the assistance of counsel. P.I. Transcript at 159, 164-5.

22. By INS officials' own admission, the presence of attorneys during asylum interviews on Guantanamo would be useful, feasible, and would not interfere with the interview process. (Pl. Ex. 68 at 129-30; Pl. ex. 69, at 124-131).

23. INS asylum officers have conducted sixty-four second asylum interviews. Thirty-four Haitians who had established a credible fear of persecution, tested positive for the HIV virus and failed to establish a well founded fear of persecution if returned to Haiti during a second INS interview would have been repatriated absent the temporary restraining order ("TRO") issued by this court on March 27, 1992.

24. Repatriated Haitians face political persecution and even death on their return. Approximately forty repatriated Haitians (also known as "Double Backers") have fled Haiti for a second time and have been screened in by the INS.

25. The Government has managed to accommodate the requests of congressmen, clergymen, church groups, and members of the press seeking access to the Haitians being held in custody on Guantanamo.

26. The Government has denied attorneys, the Haitian Service Organizations, and the Immediate Relative Plaintiffs access to the Haitians detained at Guantanamo apart from the access ordered by the TRO issued by this court and the Florida district court in *Baker*.

27. INS officials on Guantanamo lost approximately 1,080 records of Haitian aliens who consequently had to be rescreened.

28. The evidence presented by the Government is inconclusive as to any "magnet effect" resulting from the issuance of this court's TRO.

II. *CONCLUSIONS OF LAW*

A. RES JUDICATA

1. The doctrine of res judicata bars relitigation of any claim between two parties where a court has previously entered a final judgment on the merits. *Allen* v. *McCurry*, 449 U.S. 90 (1980); *Milltex Industries Corp.* v. *Jacquard Lace Co., Ltd.*, 922 F.2d 164 (2d Cir. 1991). Where the subsequent litigation involves new parties and new claims, the action is not barred by *res judicata*.

2. The Government asserts that the outcome in the *Baker* litigation binds the Screened In Plaintiffs and bars them from litigating this action. If the Government's argument that the *Baker* class [*sic*] were taken to its logical conclusion, all Haitians who have been interdicted, or who will ever be interdicted by the United States Coast Guard are forever bound by *Baker*. I find it inconceivable that the Florida district court intended to bind *all interdicted Haitians forever* when it simply maintained the class for the purposes of issuing the preliminary injunction and permitting the action to proceed. The district court granted plaintiffs' motion for class certification without holding a hearing or amending the class definition in any way. The Haitians received neither notice nor an opportunity to opt out.

3. Where the class definition is so overbroad that it fails to satisfy due process, it cannot have a *res judicata* effect. *See Finnan* v. *L.F. Rothschild & Co.*,

Inc., 726 F. Supp. 460 (S.D.N.Y. 1989) (finding that the plaintiffs suggested an "overbroad time span" for class and modifying the class accordingly); *see generally* Wright, Miller & Cooper, 7B *Federal Practice and Procedure* § 1789 (West 1981). It seems particularly unfair to bind the Screened In Plaintiffs by the outcome in *Baker* when their cause of action arises from Government conduct occurring after the conclusion of the *Baker* litigation.

4. The class of Haitian plaintiffs in *Baker* were "screened out" according to plaintiffs' description in their Memorandum in Support of Motion for Class Action Certification ("HRC Mem.").[2] Therefore, plaintiff A. Iris Vilnor, who sues on behalf of herself and all others similarly situated and seeks relief for herself and other Haitians who were "screened out" is not a new plaintiff nor is the class that she purports to represent.

5. I find, however, that the Screened In Plaintiffs are a new class which is not bound by the outcome in *Baker*.

6. The immediate relatives of "screened in" Haitians and all those similarly situated also make up an entirely new plaintiff class which was not a party to the *Baker* litigation.

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[2] The memorandum states:

> The individual plaintiffs are all Haitian emigres who were intercepted by the United States Coast Guard pursuant to a "program of interdiction" that permits interception and repatriation of undocumented aliens. They are presently being held on Coast Guard cutters and at the U.S. Naval base in Guantanamo. They have all been *'screened out'* . . . .

HRC Mem. at 2 (emphasis added).

7. Moreover, the Haitian Service Organizations in this action differ from the plaintiff organization (Haitian Refugee Center) in *Baker*. After having the opportunity to take discovery on the existence of a privity relationship between the Haitian Service Organizations and the Haitian Refugee Center, the Government has conceded that the organizations are different.

8. Therefore, *res judicata* is inapplicable to the Screened In Plaintiffs, Immediate Relative Plaintiffs, and the Haitian Service Organizations.

9. Res judicata is also inapplicable where neither the conduct complained of nor the claim had not arisen at the time of the first suit. *Prime Management Co., Inc.* v. *Steinegger*, 904 F.2d 811 (2d Cir. 1990); *N.L.R.B.* v. *United Technologies Corp.*, 706 F.2d 1254 (2d Cir. 1983); *see generally* Wright, Miller & Cooper, 18 *Federal Practice and Procedure* § 4409 (West 1981). Plaintiffs' complaint is based upon new circumstances. The INS policy of conducting second interviews to determine whether Haitians carrying the HIV virus have a well founded fear of persecution was developed after the *Baker* litigation ended. Only recently have the Haitian aliens sought the assistance of counsel. These new circumstances give rise to a new cause of action and make *res judicata* inapplicable.

10. The Screened In, Immediate Relatives and Haitian Service Organizations Plaintiffs' complaint raises new claims which were not litigated in *Baker*. For example, the Screened In Plaintiffs' statutory right of counsel, First Amendment and Fifth Amendment Due Process and Equal Protection claims are entirely new claims. As the Haitian Service Organi-

zations are new parties and their cause of action arises from the Government's post *Baker* subsequent conduct; the First Amendment claim is also new. Because the Immediate Relative Plaintiffs are a new class, all of their claims are new.

B. PRELIMINARY INJUNCTION

11. For a court to issue a preliminary injunction, the moving party must demonstrate (1) irreparable harm should the injunction not be granted, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief. *Resolution Trust Corp.* v. *Elman*, 949 F.2d 624 (2d Cir. 1991).

i. *Irreparable Harm*

12. By a preponderance of the evidence, the Screened In Plaintiffs and Haitian Service Organizations have made a showing that irreparable harm is likely to result if this preliminary injunction were issued. Specifically, the Haitian Service Organizations have shown that they may suffer content-based denials of their First Amendment right to provide counseling, advocacy and representation to their clients on Guantanamo. The Screened In Plaintiffs may face torture death if they lack access to counsel, fail in their bid to receive asylum, and are repatriated to Haiti.

ii. *Serious Questions Going to the Merits*

(a) Haitian Service Organizations' First Amendment Claim

13. The Haitian Service Organizations claim that the Government has violated their first amendment

right to free speech and to associate for the purpose of providing legal counsel by denying them access to the Screened In Plaintiffs being detained on Guantanamo.

14. According to the Government, the Haitian Service Organizations have no First Amendment right of access to an alien in the custody of the United States. As authority for this assertion, the Government cites *Ukrainian-American Bar Association* v. *Baker*, 893 F.2d 1374 (D.C. Cir. 1990). This case however is distinguishable from the facts present in the instant litigation. In *Ukrainian-American Bar Association* v. *Baker*, the plaintiff brought suit alleging that the government violated their First Amendment right of access to a potential asylee in United States custody *who had neither retained the plaintiff as counsel nor asserted a right to speak with counsel.*

15. By contrast, the Screened In Plaintiffs have retained the Haitian Service Organizations as counsel and have asserted their right to speak with their attorneys. Even if the Haitian aliens lack the right to speak with an attorney, the Haitian Service Organizations would have a right to impart information to them. *See Procunier* v. *Martinez*, 416 U.S. 396, 408-09 (1974).

16. I am also unpersuaded by the Government's argument that *Kliendienst* v. *Mandel*, 408 U.S. 753 (1972), is controlling. In *Mandel*, the Supreme Court held that 1) that an unadmitted alien had no constitutional right of entry into the United States and 2) when the executive branch exercised its power to determine the admittance of an alien into the country on the basis of a facially legitimate and bona fide reason, the courts will not test its discretion by bal-

ancing its justification against the First Amendment rights of citizens seeking to communicate with the alien.

17. Here the Screened In Plaintiffs are not asserting that they have a constitutional right to enter the United States. Instead, the Haitian Service Organizations are merely asserting that *their* First Amendment rights are being violated by the Government's refusal to allow them to have access to their clients subject to reasonable time, place, and manner restrictions.

18. The Supreme Court has held that legal and political advocacy organizations' right to associate and to advise people of their legal rights are modes of expression protected by the First Amendment. *In re Primus*, 436 U.S. 412 (1978); *NAACP* v. *Button*, 371 U.S. 415 (1963).

19. Although Guantanamo Naval Base is located in Guantanamo Bay, Cuba, it is subject to the exclusive jurisdiction of the United States pursuant to a lease and treaty agreement. Therefore, the First Amendment is applicable to United States conduct on Guantanamo. *See generally, Flower* v. *U.S.*, 407 U.S. 197, 198-99 (1972) (First Amendment applicable to U.S. conduct on a military base); *Lamont* v. *Woods*, 948 F.2d 825 (2d. Cir. 1991) (Establishment Clause of the First Amendment applies extraterritorially).

20. Despite the Government's extremely broad discretion to restrict access by civilians to military bases, it may not impose content-based restrictions upon speech. *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). The Government may regulate speech in areas not traditionally designated as public forums so long as these restrictions are reasonable as to time, place and manner, and are

not an effort to suppress expression merely because public officials oppose the speaker's views. *Id.* at 46.

21. In the context of the First Amendment, Guantanamo Naval Base appears to be a non-public forum. However, plaintiffs have presented evidence and the Government concedes that it is granting access to others—reporters, priests, doctors, congressmen—while denying access to lawyers. The only justification that the Government offers for its ban on lawyers is that they have an absolute right to determine the admittance of civilians.

22. As the Government's denial of access to the Haitian Service Organization appears to be a content based restriction on speech, I conclude that the Haitian Service Organizations have made a showing of serious questions going to the merits of their claim under the First Amendment.

(B) Screened In Plaintiffs' Claims

(1) Statutory Claim

16 [*sic*]. The standard for review of an applicant's asylum claim is whether the applicant has a well-founded fear of persecution if returned to his or her own country. *INS* v. *Cardoza Fonesca*, 480 U.S. 421, 107 S.Ct. 1207 (1987). Asylum officers on Guantanamo are using the same standard when conducting second interviews of Haitian aliens in United States custody. But these aliens are being [*sic*] the procedural protections such as the right to counsel that they would be afforded if they were being held in custody in the United States.

23. Under INS regulations, applicants for asylum have a right to counsel, to present witnesses, to submit affidavits, and to present any relevant evidence

during an asylum interview conducted by an asylum officer. 8 C.F.R. § 208.9 (1991). Detained asylum applicants also have a right to receive a list of persons or private agencies that can assist them in their application for asylum. *Id.* at § 208.5.

24. If an alien's claim is rejected by an Asylum Officer, his "application for asylum or withholding of deportation may be renewed before an Immigration Judge in exclusion or deportation hearings." 8 C.F.R. § 208.18(b) (1991). In any such hearing, plaintiffs have the right to be represented by counsel. 8 U.S.C.A. § 1362.

25. Even though I believe that the Haitian aliens are de facto asylees,[3] I must find as a matter of law that their statutory claim fails because the Immigration and Naturalization Act ("INA") expressly states that "[t]he term 'United States [*sic*], except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States." 8 U.S.C. 1101 (a)(38). As the statute fails to specifically identify Guantanamo Bay Naval Base as being within the jurisdiction of the United States for the purposes of the INA and INS regulations, I must conclude that the statutory right to counsel under 8 U.S.C.A. § 1362 and 8 C.F.R. § 208.9 does not extend to the Haitian aliens currently in custody on Guantanamo.

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[3] The Government suggests that the Haitians on Guantanamo are like refugees seeking asylum at the United States embassy in Moscow. However, the record in this case belies this analogy. A Russian refugee is free to walk out of the embassy if denied asylum. The Haitian aliens on Gantanamo are held in custody behind barbed wired fences.

(2) Constitutional Claims

26. Although the Screened In Plaintiffs' INA claim must fail, there are sufficiently serious questions going to the merits of their Due Process claim to make such claim fair ground for litigation. Congress may circumscribe the parameters of United States territory for purposes of the immigration laws, but such definition is not applicable to the U.S. Constitution unless the applicable provision of the Constitution itself limits the definition of "United States." *See Downes* v. *Bidwell*, 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088 (1901). And, just as the defendants aver that the question of whether certain domestic legislation covers activities at Guantanamo is separate from the issue of whether the criminal laws of the United States are applicable thereto, so too, the question of whether the First and Fifth Amendments apply to the screened in plaintiffs is a distinct issue.

27. Neither the due process nor equal protection clauses of the Fifth Amendment provides a circumscribed definition of the United States. Guantanamo is within United States territory subject to the exclusive control and jurisdiction of the United States pursuant to a lease and treaty. *United States v. Verdugo-Urquidez*, —— U.S. ——, 110 S.Ct. 1056 (1990) is therefore not dispositive of the rights of the screened in plaintiffs under the Fifth Amendment, even by way of analogy, because *Verdugo-Urquidez* holds that a nonresident alien may not assert a violation of the Fourth Amendment where such violation occurred on *foreign* soil. The Court has expressly stated that it believes that the Fourth Amendment operates in a different manner than the Fifth Amendment. *Verdugo Urquidez*, 110 S.Ct. at 1060.

28. In terms of the viability of the Screened In Plaintiffs constitutional claims, this court recognizes that aliens are not necessarily afforded the same rights as citizens and that immigration laws are the province of the legislative and executive branches. The Supreme Court has stated, however, that aliens within the jurisdiction of the United States enjoy the protections of the Fifth Amendment from deprivation of life, liberty, or property without due process of law. *Mathews v. Diaz*, 426, [*sic*] U.S. 67, 78, 96 S.Ct. 1883, 1890, 48 L.Ed.2d 478 *citing Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-51, 70 S.Ct. 445, 453-55, 94 L.Ed. 616, 627-29 (1950); *Wong Wing v. United States*, 163 U.S. 228, 16 S.Ct. 977, 41 L.Ed. 140 (1896). "Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection. *Id.* at 78, 96 S. Ct. at 1890 (*citing cases*).

29. Courts have also recognized that, under certain circumstances, a non-resident, non-hostile alien may enjoy the benefits of certain constitutional limitations imposed on United States actions. *See Cardenas v. Smith*, 733 F.2d 909, 915 (D.C.Cir. 1984); *United States* v. *Toscanino*, 900 F.2d 267 *reh'g denied*, 504 F.2d 1380 (2d Cir. 1974); *Porter v. United States*, 496 F.2d 583, 591 (Ct.Cl. 1974), *cert denied*, 420 U.S. 1004, 95 S.Ct. 1446, 43 L.Ed.2d 761 (1975); *compare Johnson v. Eisenstrager*, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) (holding that an alien enemy had no right to writ of habeas corpus to challenge their detention by the United States military in Germany).

30. Whatever their status under the immigration laws, the Screened In Plaintiffs certainly are "persons," and therefore entitled to the protections of the Fifth Amendment. *Compare Plyler v. Doe*, 457 U.S.

189, 211, 102 S.Ct. 2382, 2391, 72 L.Ed.2d 786 (1982) (holding that an alien is a "person" within the meaning of the equal protection clause of the Fourteenth Amendment).

31. In the instant case, the screened in plaintiffs were forcibly taken from the high seas and they have been held in custody for roughly five month. Their access to the outside world, whether by telephone, mail or otherwise has been completely restricted. They are confined in a camp surrounded by razor wire and are not free to leave, even if they have the financial capability to do so, to go to another part of the world (that is, to any country but Haiti from which they flee for fear of political persecution, torture and even death). With respect to any complaints of mistreatment or otherwise, the only recourse that the screened in plaintiffs have is to military officials on Guantanamo who apparently have complete discretion as to whether and how to respond to any such complaints. Although it is formal governmental policy to treat such aliens in a humanitarian way, if the government's argument is taken to its logical conclusion, it would, of necessity, provide the aliens with no recourse even if the conduct of a U.S. official is arbitrary, capricious, and perhaps even cruel. (*See* TRO Hearing Transcript at 39). That argument is simply untenable.

32. Admittedly, Congress and the Executive branch may restrict immigration, but that is not the issue herein. Instead, the issue before this court is whether the screened in plaintiffs may challenge the U.S. government's conduct insofar as such governmental conduct has deprived them of their liberty. The screened in plaintiffs are non-hostile individuals who were brought to Guantanamo forcibly, and who are

"in custody," and incommunicado. They are unable to move about freely and choose to leave Guantanamo at their own risk to non-United States territory (*see* P.I. Hearing Transcript at 165), and cannot even make a telephone call at their own expense. They are isolated from the world and treated in a manner worse than the treatment that which would be afforded to a criminal defendant. They are defenseless against any abuse, exploitation or neglect to which the officials at Guantanamo may subject them. Given this scenario, such individuals, albeit aliens, are entitled, at the very least, to challenge such restrictions and the related conduct of U.S. officials. Indeed, the nature and circumstances surrounding the connection between the Screened In Plaintiffs and the United States warrants a finding that they are entitled to cloak themselves in the protections of the due process clause. *See Mathews v. Diaz, supra.* Based on the foregoing, I conclude that there are serious questions going to the merits of the Screened Plaintiffs due process claim. *See Mathews v. Diaz, supra.*

(c) Other Claims

33. In light of the importance of the issues raised and the need for further consideration, I will reserve judgment on all other claims not addressed herein and I will issue a decision with respect thereto at a later date and, if appropriate after argument is heard on Defendants' Motion to Dismiss under 12(b)(6).

iii. *Balance of the Hardships*

34. The Government argues that the issuance of a preliminary injunction will create a "magnet effect" drawing more Haitians to the high seas and will in-

crease the Government's financial burden. After carefully weighing the hardships, I find that the balance tips decidedly in favor of the Plaintiffs. Moreover, I find that the [*sic*] any burden placed on the Government in permitting attorneys access to their clients for the purpose of interviewing would be minimal.

C. BOND

35. The Government has repeatedly asked the court to impose a bond on the Plaintiffs. Under particular circumstances, a court may exercise its discretion and waive the bond required under F.R.C.P. 65(c). *See United States* v. *Bedford Associates*, 618 F.2d 904, 916-17 n. 23 (2d Cir. 1980). After considering the non-profit status of the Haitian Service Organizations and the indigence of the Screened In Plaintiffs, the Plaintiffs are ordered to post a bond in the amount of $5,000.

D. Plaintiffs' Application for an Order Preventing Harassment

36. Plaintiffs have failed to put forth sufficient evidence to support their claim that the Government is harassing them because of their involvement in this lawsuit. Therefore, this court will not exercise its authority to issue an order.

E. Class Certification

F.R.Civ.P. 23 is given liberal construction and the court must take the allegations of the merits of the case, as set forth in the complaint, to be true. It is the party who seeks to utilize Rule 23 that bears the burden of establishing that the requirements of that rule are satisfied. *Cruz v. Robert Abbey, Inc.*, 778

F.Supp. 605, 612 (E.D.N.Y. 1991). The Screened in Plaintiff's [*sic*] have satisfied the basis requirements of Rule 23(b)(2) and, as such, they are entitled to maintain this action as a class action. Although the Screened In Plaintiff's motion for class certification is granted at this time, because the defendant challenges certain of plaintiff's factual allegations, I will permit them to conduct discovery and then this court will hold a hearing to ascertain whether the class certification herein granted should be modified. The court has chosen not to address the certification of the Immediate Relative Plaintiffs' motion for class certification in this Memorandum and Order.

III. *RELIEF*

For the reasons stated above, it is hereby:

ORDERED, that the defendants are preliminarily enjoined pursuant to F.R.C.P. 65 from:

a) denying plaintiff service organizations access to their clients for the purpose of providing them legal counsel, advocacy, and representation when scheduled for interviews;

b) interviewing, screening, or subjecting to exclusion or asylum proceedings any Haitian citizen currently being detained on Guantanamo (I) who has been screened in and (II) who is being detained or has been denied an opportunity to communicate with counsel; and

c) repatriating any Haitian alien being detained on Guantanamo (I) who had been screened in and (II) who has been denied the opportunity to communicate with counsel.

So ordered.

/s/ Sterling Johnson, Jr.
United States District Judge

Dated: Brooklyn, New York
April 6, 1992

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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92 CV 1258

HAITIAN CENTERS COUNCIL, INC., NATIONAL COALITION FOR HAITIAN REFUGEES, INC., IMMIGRATION LAW CLINIC OF THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION, OF NEW HAVEN CONNECTICUT; DR. FRANTZ GUERRIER, PASCAL HENRY, LAURITON GUNEAU, MEDILIEU SOREL ST. FLEUR, DIEU RENEL, MILOT BAPTISTE, JEAN DOE, AND ROGES NOEL ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED; A. IRIS VILNOR ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED; MIREILLE BERGER, YVROSE PIERRE AND MATHIEU NOEL ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF,

- against -

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, WILLIAM P. BARR, ATTORNEY GENERAL; IMMIGRATION AND NATURALIZATION SERVICE; JAMES BAKER, III, SECRETARY OF STATE; REAR ADMIRAL ROBERT KRAMEK AND ADMIRAL KIME, COMMANDANTS, UNITED STATES COAST GUARD; AND COMMANDER, U.S. NAVAL BASE, GUANTANAMO BAY, DEFENDANT.

[Filed July 29, 1992]

MEMORANDUM AND ORDER

Johnson, District Judge:

Plaintiffs have moved on Order to Show Cause for a temporary restraining order pursuant to Fed. R. Civ. P. 65 restraining the Government from repatriating, under the May 24th Executive Order, any interdicted Haitian to Haiti whose life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. For the reasons stated below, the court declines to grant the relief sought.

BACKGROUND [1]

On May 24, 1992, the United States dramatically altered its policy toward Haitian refugees fleeing the political upheaval in Haiti. The President issued an Executive Order under which any Haitian interdicted beyond the territorial waters of the United States must be returned directly to Haiti without being afforded the opportunity to undergo INS refugee screening. Plaintiffs quickly moved on Order to Show Cause for a temporary restraining order pursuant to Fed. R. Civ. P. 65 restraining the Government from acting pursuant to the May 24th Executive Order.

At a hearing on May 29, 1992, the Plaintiffs asserted that the Government's actions violate 1) the United States' obligations under Article 33 of U.N. Protocol Relating to the Status of Refugees; and 2) Section 243(h) of the Immigration and Nationality

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[1] The court assumes familiarity with the facts and issues in this case. For a more detailed discussion of the history of this litigation *see* Memorandum and Order dated March 27, 1992 and Memorandum and Order dated April 6, 1992.

Act ("INA"). At the close of the hearing, the court reserved decision in order to consider the briefs submitted by the parties and to give careful attention to the weighty issues presented.

DISCUSSION

The Government contends that the relief sought by the Plaintiffs is tantamount to a request for a mandatory injunction. The court agrees that the relief sought is closer to a request for more permanent injunctive relief and construes Plaintiffs' application as a request for a preliminary injunction. For a court to issue a preliminary injunction, the moving party must demonstrate (1) irreparable harm should the injunction not be granted, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief. *Resolution Trust Corp.* v. *Elman*, 949 F.2d 624 (2d Cir. 1991). Although the Plaintiffs undeniably makes a substantial showing of irreparable harm, the court finds that the Plaintiffs are unlikely to succeed on the merits.

Article 33 of the U.N. Protocol Relating to the Status of Refugees provides that "no contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion." On its face, Article 33 imposes a mandatory duty upon contracting states such as the United States not to return refugees to countries in which they face political persecution. Notwithstanding the explicit language of

the Protocol and dicta in Supreme Court cases such as *INS* v. *Cardoza Fonseca*, 480 U.S. 421 (1987) and *INS* v. *Stavic*, 467 U.S. 407 (1984), the controlling precedent in the Second Circuit is *Bertrand* v. *Sava* which indicates that the Protocols' provisions are not self-executing. *See* 684 F.2d 204, 218 (2d Cir. 1982).

It is unconscionable that the United States should accede to the Protocol and later claim that it is not bound by it. This court is astonished that the United States would return Haitians refugees to the jaws of political persecution, terror, death and uncertainty when it has contracted not to do so. The Government's conduct is particularly hypocritical given its condemnation of other countries who have refused to abide by the principle or non-refoulement.[2] As it stands now, Article 33 is a cruel hoax and not worth the paper it is printed on unless Congress enacts legislation implementing its provisions or a higher court reconsiders *Bertrand*. Until that time, however, this court feels constrained by the rationale of *Bertrand* and cannot grant the Plaintiffs relief on this claim.

Finally, this court concluded in an earlier decision in this case that the right to counsel under the INA did not extend to Haitian aliens who were located outside the United States as defined by the statute. *See* Memorandum and Order dated April 6, 1992, ¶ 26. This issue is currently on appeal before the Second Circuit. Unless the Court of Appeals rules otherwise, the court must again conclude that the Section 243(h) is simi-

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[2] Only recently, the United States criticized Great Britain for its forcible repatriation of Vietnamese boat people, whom Great Britain have classified as 'economic migrants'. *See* Daniela Deane, *Britain to Ignore U.S. Pleas on Return of Boat People*, Washington Post, January 26, 1990, at A18.

larly unavailable as a source of relief for Haitian aliens in international waters.

CONCLUSION

Accordingly, the relief requested by the Plaintiffs is hereby denied.

So ordered.

/s/ Sterling Johnson, Jr.
STERLING JOHNSON, JR.
United States District Judge

Dated: Brooklyn, New York
June 5, 1992

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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92 CV 1258

HAITIAN CENTERS COUNCIL, INC., NATIONAL COALITION FOR HAITIAN REFUGEES, INC., IMMIGRATION LAW CLINIC OF THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION, OF NEW HAVEN CONNECTICUT; DR. FRANTZ GUERRIER, PASCAL HENRY, LAURITON GUNEAU, MEDILIEU SOREL ST. FLEUR, DIEU RENEL, MILOT BAPTISTE, JEAN DOE, AND ROGES NOEL ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED; A. IRIS VILNOR ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED; MIREILLE BERGER, YVROSE PIERRE AND MATHIEU NOEL ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF,

- against -

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, WILLIAM P. BARR, ATTORNEY GENERAL; IMMIGRATION AND NATURALIZATION SERVICE; JAMES BAKER, III, SECRETARY OF STATE; REAR ADMIRAL ROBERT KRAMEK AND ADMIRAL KIME, COMMANDANTS, UNITED STATES COAST GUARD; AND COMMANDER, U.S. NAVAL BASE, GUANTANAMO BAY, DEFENDANT.

ORDER

Johnson, District Judge:

In accordance with the July 29, 1992 decision of the Court of Appeals for the Second Circuit reversing this court's decision in Memorandum and Order dated June 5, 1992 and remanding the case to this court with instructions to enter an injunction, it is hereby:

ORDERED, that the defendants are preliminarily enjoined pursuant to Fed. R. Civ. P. 65 from returning to Haiti any interdicted Haitian whose life or freedom would be threatened on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.

So ordered.

/s/ Sterling Johnson, Jr.
STERLING JOHNSON, JR.
United States District Judge

Dated: Brooklyn, New York
July 29, 1992

APPENDIX G

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 91-6060

HAITIAN REFUGEE CENTER, INC., *et al.*,
PLAINTIFFS-APPELLEES,

v.

JAMES BAKER, III, Secretary of State, ROBERT KRAMEK, Rear Admiral, KIME, Admiral, Commandant, United States Coast Guard, GENE MCNARY, Commissioner, Immigration and Naturalization Service, UNITED STATES DEPARTMENT OF JUSTICE, Immigration and Naturalization Service, UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the Southern District of Florida

Rehearing and Rehearing En Banc
Denied Jan. 28, 1992

Dec. 17, 1991

Before TJOFLAT, Chief Judge, HATCHETT and COX, Circuit Judges.

PER CURIAM:

On December 3, 1991, the district court issued a preliminary injunction prohibiting the defendants, James Baker, III, and others from forcefully repatriating Haitians in their custody. The defendants appeal. The appeal has been expedited and is now ripe for decisions on the merits.

The district court's order granting the preliminary injunction was grounded on a finding that there was a substantial likelihood that the plaintiffs would prevail on the merits of two judicially enforceable claims: (1) "HRC's right of association and counsel, which arises from the First Amendment to the United States Constitution;" and (2) "the Haitian plaintiffs' right of nonrefoulment, which arises under Article 33 of the 1967 United Nations Protocol Relating to the Status of Refugees."

[1] Ordinarily, the grant of a preliminary injunction is reviewed for abuse of discretion; however, if the trial court misapplies the law we will review and correct the error without deference to that court's determination. *Cable News Network, Inc. v. Video Monitoring Servs., Inc.*, 940 F.2d 1471, 1477 (11th Cir.1991).

In order to prevail on a motion for preliminary injunction, the movant has the burden of proving: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) its own injury outweighs the injury to the nonmovant; and (4) the injunction would not disserve the public interest. *Id.* at 1478, *Tally-Ho, Inc. v. Coast Community College Dist.*, 889 F.2d 1018, 1022 (11th Cir.1990).

[2] Defendants argue that the Haitian plaintiffs in this case have no enforceable rights under Article 33 because Article 33 is not self-executing as to persons situated like the plaintiffs in this case. The individual Haitians who are plaintiffs in this case have not reached United States territory.

[3] The language of the Protocol and the history of the United States' accession to it leads to the conclusion that Article 33 is not self-executing and thus provides no enforceable rights to the Haitian plaintiffs in this case. (A "self-executing" international agreement is one that directly accords enforceable rights to persons without the benefit of Congressional implementation.) *See Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir.1987) (Edwards, J. concurring in part and dissenting in part); *Bertrand v. Sava*, 684 F.2d 204 (2nd Cir.1982); *Pierre v. United States*, 547 F.2d 1281 (5th Cir.1977), *vacated on other grounds*, 434 U.S. 962, 98 S.Ct. 498, 54 L.Ed.2d 447 (1977).

[4] Next, the defendants argue that even if the plaintiffs had a First Amendment right of access to the interdicted Haitians, the relief granted by the injunction is unrelated to the right asserted by HRC. The district court's injunction order states as follows:

> [D]efendants are hereby enjoined from forcefully repatriating the individual plaintiffs or class members in their custody either until the merits of the underlying action are resolved or until defendants implement and follow procedures, such as those contained in the INS Guidelines, adequate to ensure that Haitians with bona fide political asylum claims are not forced to return to Haiti in violation of Article 33 of the

Protocol. To this end, within seven days defendants shall submit to the court a recital of the procedures to be followed.

The district court's order is not merely overly broad, *see United States v. Gilbert*, 920 F.2d 878 (11th Cir. 1991), it fails to redress the right asserted by HRC. Here, HRC asserts a right of access to the interdicted Haitians. The injunctive relief granted by the district court does not require the defendants to allow HRC access to the Haitian interdictees, it enjoins the defendants from repatriating them. Because the relief granted does not address the right of access asserted by HRC, the First Amendment claim cannot support the injunction.

[5] Judge Hatchett, in dissent, would uphold the issuance of the preliminary injunction on the basis of the APA claim. The district court refused to grant relief on this claim. The plaintiffs do not cross-appeal. We cannot properly uphold the injunction based on the APA claim under these circumstances. Furthermore, to do so would constitute a holding by this court, on appeal, that the plaintiffs are entitled to injunctive relief on the APA claim as a matter of law.

For the foregoing reasons, the preliminary injunction issued by the district court is hereby DISSOLVED and the case is REMANDED to the district court with instructions to dismiss, on the merits, the claims predicated on Article 33.

The mandate shall issue immediately and no petition for panel rehearing will be entertained.[1]

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[1] This brief opinion is filed in order to expedite disposition of the appeal. No supplemental opinion will be filed.

HATCHETT, Circuit Judge, dissenting:

I respectfully dissent. The district court properly issued the preliminary injunction in this case. Additionally, I dissent from the majority's decision that although this court has jurisdiction over this case, the scope of our jurisdiction is not broad enough to afford review of the district court's refusal to grant the preliminary injunction on the Administrative Procedures Act (APA) claim.

A. FACTUAL MATTERS

It is important to put this case in proper context through consideration of factual matters borne out by the record.

1. Under existing law, any refugee may reach the shores of the United States and thereby acquire the right to enforce United States immigration laws in United States courts, except Haitian refugees. Only Haitian refugees are intercepted in international waters and repatriated to their country of origin. This activity is conducted under an agreement between the Reagan administration and the totalitarian Haitian government in place in 1981, the regime of Jean-Claude Duvalier.

2. The government asserts that prior to the district court's entry of the preliminary injunction, it fairly and adequately applied United States immigration laws to the refugees' claims of political asylum. The district court's preliminary injunction provides that the government refrain from repatriating Haitian refugees until the court has determined the merits of this case or until the government submits a plan out-

lining its screening procedures.[1] Consequently, the district court has ordered the government to do no more than the government maintains it was already doing. Thus, the order does not harm the government at all, and certainly imposes no "irreparable harm." The balance of harms in this case tips decidedly in favor of the Haitian refugees, who face injury or death if wrongfully repatriated.

3. A simple reading of the district courts preliminary injunction belies the governments argument that the district court has barred it from returning these refugees to Haiti. At most, the preliminary injunction *delays* the return of refugees not entitled to political asylum in the United States. Nothing in the preliminary injunction can lead one to conclude that these refugees must either be brought to the United States or carried to Guantanamo Bay, Cuba, to be held indefinitely.

4. The government seeks to convince this court that its interdiction program was instituted as an effort to have the lives of Haitian refugees traveling in unseaworthy vessels. But the government's own brief shows that the program was instituted in 1981, long before the current immigration wave, for the express purpose of more efficiently enforcing United States immigration law. The primary purpose of the program was, and has continued to be, to keep Haitians out of the United States.

5. At the bottom of this case is the government's decision to intercept Haitian refugees on the high seas, in international waters, to prevent them from reaching United States territory. If these refugees reach

[1] The government has not submitted such a plan.

United States territory, they will have the right to insist, in United States courts, that they be accorded proper, fair, and adequate screening procedures.[2] In addition, they will receive counseling from the Haitian Refugee Center (HRC) and volunteer lawyers who will ensure the proper application of United States immigration laws. The interdiction program is a clear effort by the government to circumvent this result.

The United Nations Protocol on Refugees, and the United States immigration laws which execute it, were motivated by the World War II refugee experience. Jewish refugees seeking to escape the horror of Nazi Germany sat on ships in New York Harbor, only to be rebuffed and returned to Nazi Germany gas chambers. Does anyone seriously contend that the United States's responsibility for the consequences of its inaction would have been any less if the United

[2] In its Reply Brief the government states: As explained in our opening brief, the Executive Order and the INS guidelines are fully compatible with Article 33: if an INS interview suggests that a legitimate claim to refugee status exists, the person is to be removed from the interdicted vessel and transported to the United States, where the statutory provisions for withholding of deportation and asylum become applicable, as do our international obligations under the Protocol.

This is a long way of saying that the government will afford political asylum to those refugees it cares to, but will not afford any opportunity for review for those it denies relief. Consequently, the government will apply United States law to these refugees—in the middle of the sea—but will not have the application of United States law tested in United States courts. Since no other forum is available, the refugees are completely at the mercy of their captors. In fact, the capture prevents the refugees from seeking asylum in other countries.

States had stopped the refugee ships *before* they reached our territorial waters? Having promised the international community of nations that it would not turn back refugees at the border, the government yet contends that it may go out into international waters and actively prevent Haitian refugees from reaching the border. Such a contention makes a sham of our international treaty obligations and domestic laws for the protection of refugees.

6. Through this lawsuit, these refugees are not requesting admission to the United States, but are only seeking to have their claims for political asylum fairly considered.

B. JURISDICTION AND APPEALABILITY

HRC contended in the court below that the APA gives it a cause of action to challenge the actions of lower executive branch officials in carrying out the interdiction program. The district court held that the APA afforded no such relief, on the grounds that the challenged agency actions were committed to agency discretion, and thus exempt from review. HRC properly seeks review of this adverse determination on appeal. The majority contends, however, that this court may not review the district court's holding on the APA claim because the district court ultimately granted injunctive relief on other grounds.

The denial or granting of a preliminary injunction gives this court jurisdiction to decide all the issues on which the district court ruled, and the preliminary injunction may be upheld on the basis of any valid claim. 28 U.S.C. § 1292(a)(1). We are called upon to decide whether the preliminary injunction was properly issued on any ground asserted and determined. By not reviewing the APA claim, the majority takes an unrealistic and narrow view of this court's jurisdiction and role. In this highly expedited case, concerns of finality and conservation of judicial labor favor the swift resolution of all claims upon which the district court ruled.

Section 1292(a)(1) provides, in pertinent part:

> "[T]he courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts . . . granting, continuing, modifying, or *refusing* or dissolving injunctions, or refusing to dissolve or modify injunctions, ..." (Emphasis added.)

The district court *refused* to grant the refugees the preliminary injunction on their APA claim; therefore, no jurisdictional impediment exists which prevents this court from reaching and deciding whether the preliminary injunction is proper based on the APA claim. *See Roberts v. St. Regis Paper Co.*, 653 F.2d 166 (5th Cir.1981). This court should reach and determine the merits of the APA claim.[3]

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[3] In *Jean v. Nelson*, 727 F.2d 957 (11th Cir.1984) (en banc), this court recognized that a reviewing court could uphold the relief granted by the lower court on grounds different from those relied upon by the lower court. The en banc court in *Jean* rejected the district court's holding that the plaintiffs (Haitians) could assert due process and equal protection challenges to the government's decision to detain or parole excludable aliens. 727 F.2d at 963. The court went on to hold however, that the Haitians could challenge the government's decision to detain them under an abuse of discretion standard. 727 F.2d at 975-76. The court stated:

> The district court erred to the extent that it based its jurisdiction to review these determinations on constitutional grounds. The basis for jurisdiction here must be

C. ARTICLE 33

The majority holds that the district court erred in concluding that the 1967 United Nations Protocol Relating to the Status of Refugees (Protocol), which incorporates Article 33 of the 1951 Convention Relating to the Status of Refugees, gives refugees outside the territorial boundaries of the United States the right to press in domestic courts claims that the United States is violating obligations under the Protocol treaty.[4] Because Article 33 is self-executing and applies extra-territorially, I would uphold the preliminary injunction.

In the Protocol, a refugee is defined as any person who,

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwill-

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found elsewhere, in the principle that agencies must respect the statutory limits on their discretion, and in the recognition that agency deviation from its own internal regulations and procedures may justify judicial relief in a case otherwise properly before the court. 727 F.2d at 976 [internal quotations and citation omitted].

Thus in *Jean*, this court, sitting en banc, explicitly recognized that it could grant relief on grounds not even before the district court, especially where, as here, the substance of the claim for relief involves "agency deviation from its own regulations and procedures." 727 F.2d at 976.

[4] This provision will be referred to as Article 33. The Protocol incorporates articles 2 through 34 of the Convention. The United States acceded to the protocol on November 1, 1968. 19 U.S.T. 6223; T.I.A.S. 6577.

> ing to avail himself of the protection of that country.

Protocol, art. 1, ¶ 2, 19 U.S.T. 6223, 6225; T.I.A.S. No. 6577 at 3. Article 33, which is incorporated into the Protocol, provides:

> No contracting state shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion.

Convention Relating to the Status of Refugees, art. 33, ¶ 1, 198 U.N.T.S. 150, 176 (July 28, 1951). Additionally, Article 3 of the Convention provides that the provisions of the Protocol are to be applied to all refugees without discrimination as to race, religion or country of origin. *See* Convention, art. 3, 189 U.N.T.S. 150 (July 28, 1951). The majority holds that Haitian refugees outside the territorial boundaries of the United States have no right to challenge whether the procedures which implement the United States interdiction program violates the principles in the Protocol, regardless of whether the procedures are inadequate to ensure that refugees are not returned to territories where their lives or freedom will be threatened on account of their race, religion, nationality, membership in particular social groups or political opinions.

The majority so holds even though citizens or subjects of other nations ordinarily can enforce a treaty in the domestic courts of the United States to the extent that the treaty's provisions confer certain rights upon them and take on the nature of domestic law.

See Edye v. Robertson, 112 U.S. 580, 598-99, 5 S.Ct. 247, 253-54, 28 L.Ed. 798 (1884). The former Fifth Circuit held that "treaties affect the municipal law of the United States only when those treaties are given effect by congressional legislation or are, by their nature, self-executing." *United States v. Postal*, 589 F.2d 862, 875 (5th Cir.), *cert. denied*, 444 U.S. 832, 100 S.Ct. 61, 62 L.Ed.2d 40 (1979); *see also Whitney v. Robertson*, 124 U.S. 190, 8 S.Ct. 456, 31 L.Ed. 386 (1888). The provision of the Protocol which provides non-refoulement protection to refugees outside the United States has not been given effect by congressional legislation. *See Bertrand v. Sava*, 684 F.2d 204, 218-19 (2d Cir. 1982) (holding that Congress has implemented the Protocol, at least in part, through the Refugee Act of 1980, but noting that the Refugee Act does not provide rights to aliens outside the United States). Nevertheless, the Protocol affects the domestic law of the United States and is binding upon the government to the extent that it is self-executing. *See Postal*, 589 F.2d at 875.

In *Postal*, the court held that "whether a treaty is self-executing is a matter of interpretation for the courts." *Postal*, 589 F.2d at 876. Additionally, the court noted in *Postal* that in determining self-execution, courts consider the parties' intent, the legislative history, and the subject matter of the treaty. *Postal*, 589 F.2d at 876-77. However, the court also noted that it is difficult to ascribe a common intent to the language of a multilateral treaty which indicates a manifest purpose for the treaty to operate as the domestic law of the ratifying nations by its own force. *See Postal*, 589 F.2d at 878; *see also* Iwasawa, *The Doctrine of Self-Executing Treaties in the United States; a Critical Analysis*, 26 Va.J. Int'l

L., 627, 656 n. 122 (1986); Note, *Interdiction: The United States Continuing Violation of International Law*, 68 B.U.L.Rev. 773, 780 (1988). Thus, consideration of the intent of the parties to the Protocol is least helpful, and the majority should have limited its consideration to the subject matter, legislative history, and subsequent treaty construction. *See Postal*, 589 F.2d at 876-77.

The Protocol's subject matter supports the proposition that the treaty is self-executing, because it neither explicitly calls for legislation nor requires positive legislative action, such as the appropriation of money or the imposition of sanctions. *See Postal*, 589 F.2d at 877; Note, *Interdiction*, 68 B.U. L.Rev. at 781. Additionally, the legislative history surrounding the Protocol further supports the conclusion that the treaty is self-executing. For example, the committee report recommending accession provided that the United States is automatically bound to apply articles 2 through 34 of the convention. *See* Sen. Exec.Rep. No. 14, 90th Cong., 2d Sess. (1968); *see also* Note, *Interdiction*, 68 B.U. L.Rev. at 785-86.

Finally, the subsequent construction of the Protocol also supports the proposition that it is self-executing. *See Nicosia v. Wall*, 442 F.2d 1005, 1006 n. 4 (5th Cir. 1971) (without recognizing implementing legislation, the court noted that the Protocol binds acceding states to apply certain provisions of the 1951 Refugee Convention); *Fernandez-Roque v. Smith*, 539 F.Supp. 925, 935 n. 25 (N.D.Ga.1982) (inclined towards view of self-execution); *see also Sannon v. United States*, 427 F.Supp. 1270, 1274 (S.D.Fla. 1977) (holding that Protocol established aliens' right to a hearing), *vacated and remanded on other grounds*, 566 F.2d 104 (5th Cir.1978); *Matter of*

Dunbar, Interim Decision of Board of Immigration Appeals No. 2192,310 at 313 (April 17, 1973) (stating in regard to protocol that "such a treaty, being self-executing, has the force and effect of an act of Congress"); *but see Bertrand v. Sava*, 684 F.2d 204, 218-19 (2d Cir.1982) (holding that "the Protocol provisions were not themselves a source of rights under our law unless and until Congress implemented them by appropriate legislation"); *Haitian Refugee Center, Inc. v. Gracey*, 600 F.Supp. 1396, 1403-04 (D.D.C.1985) (holding the same as *Bertrand v. Sava*), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir.1987). Thus, although the intent of the parties is unclear, the subject matter, legislative history, and subsequent construction of the Protocol support the proposition that the Protocol is self-executing and binding upon the United States in accordance with Article VI of the United States Constitution.

After establishing that the Protocol is self-executing, the question becomes whether the Protocol's protections apply to refugees outside the territorial boundaries of the United States. The Supreme Court stated in *United States v. Stuart*, 489 U.S. 353, 109 S.Ct. 1183, 103 L.Ed.2d 388 (1989) that "the clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" *Stuart*, 489 U.S. at 365-66, 109 S.Ct. at 1191 (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180, 102 S.Ct. 2374, 2377, 72 L.Ed.2d 765 (1982)). In his concurrence, Justice Scalia was even more emphatic, stating that "our traditional rule of treaty construction is that an agreement's language is the best evidence of its purpose and its parties intent." *Stuart*, 489 U.S. at 372, 109 S.Ct. at 1194. (Scalia, J., concurring). Article 33 unequivocally provides that "[n]o contracting state shall *expel* or *return* (refouler) a refugee," fleeing bona fide political persecution, "*in any manner whatsoever* to . . . territories where [the refugee's] life or freedom would be threatened." Article 33, 198 U.N.T.S. at 176 (emphasis added). As noted earlier, it is difficult to ascribe a common intent to the language of a multilateral treaty. *See Postal*, 589 F.2d at 878. Therefore, the clear import of the treaty language must control in determining the purpose of the treaty. *Compare United States v. Postal*, 589 F.2d 862, 875 (5th Cir.1979) (difficult to ascribe a common intent to the language of a multilateral treaty) *with United States v. Stuart*, 489 U.S. 353, 365-66, 109 S.Ct. 1183, 1191, 103 L.Ed.2d 388 (1989) (clear import of treaty language controls unless inconsistent with intent).

The Supreme Court also stated in *Stuart* that "the practice of treaty signatories counts as evidence of the treaties' proper interpretation, since their conduct generally evinces their understanding of the agreement they signed." *Stuart*, 489 U.S. at 369, 109 S.Ct. at 1193. Executive Order 12324 and the accompanying guidelines reflect the United States's understanding that the prohibition against refoulement is binding and protects Haitians interdicted on the high seas. Moreover, the district court correctly noted:

> it seems substantially unlikely that a protocol designed to protect refugees fleeing bona fide political persecution could have been intended not to provide protection to the Haitians fleeing

> the brutal, military regime now in power on the ground that those fleeing had not yet reached the territory of a party to the Protocol.

The United Nations High Commission for Refugees asserts that the terms of Article 33 and the nonrefoulement principle apply extraterritorially. The Supreme Court held in *Stuart* that

> given that a treaty should generally be 'construed . . . liberally to give effect to the purpose which animates it,' and that 'even where a provision of a treaty fairly admits two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.'

Stuart, 489 U.S. at 368-69, 109 S.Ct. at 1192-93 (quoting, *Bacardi Corp. of America v. Domenech*, 311 U.S. 150, 163, 61 S.Ct. 219, 225-26, 85 L.Ed. 98 (1940)). Thus, Haitians interdicted on the high seas outside the territorial boundaries of the United States are entitled to the Protocol's protections.

D. FIRST AMENDMENT

The district court did not err in finding a substantial likelihood of success on the grounds that the government had violated the Haitian Refugee Center's (HRC) First Amendment right of access to the interdicted Haitians. As this court has held, "counsel have a First Amendment right to inform individuals of their rights, at least when they do so as an exercise of political speech without expectation of remuneration." *Jean v. Nelson*, 727 F.2d 957, 983 (11th Cir. 1984) (en banc); *see also In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978); *NAACP v.*

Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). HRC seeks to exercise precisely such a right of access in this case. The fact that the Haitian refugees are currently outside the borders of the United States does not diminish HRC's right of access. The Haitian Refugee Center, a Florida nonprofit corporation, may invoke constitutional rights that are impaired by U.S. Government action abroad. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 270, 110 S.Ct. 1056, 1063, 108 L.Ed.2d 222 (1990); *Reid v. Covert*, 354 U.S 1, 7, 77 S.Ct. 1222, 1225, 1 L.Ed.2d 1148 (1957).[5]

With respect to the Guantanamo Bay Naval Station, an area under the "complete jurisdiction and control" of the United States, HRC is entitled to First Amendment protection. Of course, HRC's First Amendment rights are constrained by the government's strong interest in regulating activities on its

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[5] The majority obviously accepts the government's contention that *Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972), controls HRC's first amendment claim. In *Kleindienst*, the plaintiffs claimed that their first amendment rights were violated by the exclusion of a foreign Marxist. In the instant case, HRC claims its first amendment rights are violated by the government's refusal to give it access to Haitians detained at Guantanamo Bay. The court's holding in *Kleindienst* that the plaintiffs' first amendment rights could not compel the government to grant entry to an excluded alien is simply irrelevant to the relief demanded by HRC in the instant case. Here, HRC seeks not entry of the Haitians, but access to them at the places where they are held by the U.S. government. Thus, the case is far more analogous to the facts in *Jean v. Nelson*, 727 F.2d 957, 983 (11th Cir.1984) (en banc), where the court found a right of access, than to *Kleindienst*, where the court found no right of entry.

military bases. Like most military bases, the Guantanamo Bay Naval Station is a "nonpublic forum." *See MNC Hinesville v. United States Dept. of Defense*, 791 F.2d 1466, 1473 (11th Cir.1986). Consequently, the government may reserve it entirely for its intended purpose as a military base, so long as any restriction on speech is reasonable and content neutral. *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37, 46, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983).

The district court correctly found that the government acted unreasonably in denying HRC access to the interdicted Haitians. HRC seeks access only to that part of Guantanamo Bay used to detain interdicted Haitians. In that area, the government's purely military interests are diminished while HRC's interest in counseling the Haitians is increased. The government too shares an interest in ensuring that no political refugees are wrongfully repatriated. In gaining access to the Haitians, HRC helps the United States carry out its obligations under domestic and international law. Finally, as the district court noted, HRC has no alternative means of exercising the First Amendment right it asserts in this case. I would hold that the government must afford HRC access to the interdicted Haitians detained at Guantanamo Bay, subject to reasonable, content-neutral, time, place, and manner restrictions.[6]

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[6] Contrary to the government's protestations, HRC seeks only such access as a remedy. It has never argued that a ban on repatriation is the only way to effectuate its first amendment right of access.

Even if the majority is correct in holding that the district court's preliminary injunction is too broad on the HRC's First Amendment claim, the district court should only be ordered to narrow the scope of the relief. Rather, the majority dissolves the preliminary injunction.

Because this case is alive in the district court on other issues not ruled upon, and because the preliminary injunction is well grounded in law, it should be left in place at least until the district court determines all the issues in the case.[7]

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[7] Due to the expedited nature of this case, this dissent only discusses issues the majority discusses. I agree to immediate issuance of the mandate and no further rehearing by this panel.

APPENDIX H

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 91-6099, 91-6105 and 91-6118

HAITIAN REFUGEE CENTER, INC., ET AL.,
PLAINTIFFS-APPELLEES,

v.

JAMES BAKER, III, Secretary of State, ROBERT KRAMEK, Rear Admiral, KIME, Admiral, Commandant, United States Coast Guard, GENE MCNARY, Commissioner, Immigration and Naturalization Service, United States Department of Justice, Immigration and Naturalization Service, United States of America, DEFENDANTS-APPELLANTS.

HAITIAN REFUGEE CENTER, INC., a not-for-profit corporation, ROLAND PROVIDENCE, MOISE CHARLES, ERIC PIERRE, RAYMOND EDME, GOLBERT MIRACLE, ROLAND JEAN, ROOSEVELT ALEXIS, LUC LUXEMBOURG SANON, LEGER PIERRE FRANTZ, OCHEL ENGERILL, JEAN MICHEL MARIO AVILUS, ARCHILLE BELVU, LUCIEN ROZIER, EMMANUEL SAINTIL and CONDANSER JOSEPH, on behalf of themselves and all others similarly situated, PLAINTIFFS-APPELLEES, CROSS-APPELLANTS,

v.

JAMES BAKER, III, Secretary of State, Rear Admiral ROBERT KRAMEK and Admiral KIME, Commandants, United States Coast Guard, GENE MCNARY, Commissioner, Immigration and Naturalization Service, United States Department of Justice, Immigration and Naturalization Service, and United States of America, DEFENDANTS-APPELLANTS, CROSS-APPELLEES.

Appeals from the United States District Court
for the Southern District of Florida.

Feb. 4, 1992

Before TJOFLAT, Chief Judge, HATCHETT and COX, Circuit Judges.

PER CURIAM:

I. FACTS AND PROCEDURAL HISTORY

In 1981, President Ronald Reagan determined that the uncontrolled immigration of visaless aliens was a "serious national problem detrimental to the interests of the United States." Proclamation No. 4865, 46 Fed.Reg. 48,107 (1981), *reprinted in* 8 U.S.C.A. § 1182 note (1982). As a result of this determination, President Reagan issued an Executive Order directing the Secretary of State to enter "cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal immigration to the United States by sea." Exec. Order No. 12324, 46 Fed.Reg. 48,109, 48,210 (1981), *reprinted in* 8 U.S.C.A. § 1182 note (Executive Order). The Executive Order required the Secretary of Transportation to instruct the Coast Guard to enforce "the suspension of the entry of undocumented aliens and the interdiction of any defined vessels carrying such aliens." *Id.* at § 2(a). Among the "defined" vessels to be interdicted by the Coast Guard were vessels of foreign nations that had entered into agreements with the

United States authorizing the United States to stop and board their vessels. *Id.* at § 2(b)(3).

The instructions given the Coast Guard were to include appropriate directives for it to stop and board defined vessels when there was reason to believe that such vessels were engaged in the irregular transportation of people or that the laws of the United States or the agreeing nation were being violated. Further, the Coast Guard was to determine the destination and status of those on board and to return the vessel to the country from which it came when there was reason to believe that the immigration laws of the United States or the foreign country were being violated. Finally, the Coast Guard was to be instructed not to return a "refugee" without his consent. *Id.* at § 2(c). These actions by the Coast Guard were authorized to be taken only outside the territorial waters of the United States. *Id.* at § 2(d).

Also pursuant to the Executive Order, the Attorney General, in consultation with the Secretary of State and the Secretary of Transportation, was to take steps necessary to "ensure the fair enforcement of our laws relating to immigration (including effective implementation of the Executive Order) and the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland." *Id.* at § 3.

In compliance with the Executive Order, the Secretary of State entered into an agreement with the Haitian government under which the United States was authorized to interdict and board Haitian flagged vessels suspected of carrying illegal immigrants. T.I.A.S. No. 10,241. Under the agreement, it was understood that the United States would not return immigrants whom immigration officials determined to

qualify for refugee status. *Id.* Also, Haiti agreed that any immigrants returned to Haiti would not be prosecuted for illegal departure. *Id.*

An "international obligation" to which the Executive Order refers and that is at issue in this case is the 1967 United Nations Protocol Relating to the Status of Refugees (Protocol). Article 33 of the Protocol provides in part as follows:

> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The term "refugee" as defined in the Protocol and incorporated in 8 U.S.C. § 1101(a)(42)(A) means:

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, ...

Pursuant to the Executive Order, the Immigration and Naturalization Service (INS) promulgated guidelines to be followed by INS employees assigned to the interdiction program. The Guidelines read as follows:

INS ROLE AND GUIDELINES FOR INTERDICTION AT SEA

The following directives are to be followed by INS employees assigned to Coast Guard vessels interdicting vessels at sea pursuant to Presidential Proclamation 4865, dated September 29, 1981, and Executive Order Number 12324, dated September 29, 1981.

GENERAL

* Due to the sensitive nature of this assignment, all INS employees will be under the direct supervision of INS Central Office Headquarters, Associate Commissioner, Examinations.

* The only function INS officers are responsible for is to ensure that the United States is in compliance with its obligations regarding actions toward refugees, including the necessity of being keenly attuned during any interdiction program to any evidence which may reflect an individual's well-founded fear of persecution by his or her country of origin for reasons of race, religion, nationality, membership within a particular social group or political opinion.

* The duties of INS employees assigned to United States Coast Guard vessels will be limited to matters related to the interview of persons on board with respect to documentation relating to entry to the United States and possible evidence of refugee status.

* Except for independent determinations with respect to documentation relating to entry into the United States and possible claims to refugee status, INS officers will be subject to maritime

directives and rules made by the Commanding Officer of the United States Coast Guard vessel.

* * * * *

BOARDING OF VESSELS

* All decisions relating to which vessels will be interdicted and in what manner vessels will be boarded will be made at the discretion of the Commanding Officer of the United States Coast Guard vessel.

* INS officers and interpreters will be members of each boarding party. INS employees will not be armed.

* All initial announcements to the master, crew, and passengers of a boarded vessel as to the purpose of boarding, separation of crew and passengers, and general procedures (including advice that the boarded vessel may be returned to Haiti) will be made by United States Coast Guard personnel at the time the vessel is first boarded.

INS OFFICER RESPONSIBILITIES

A. To the extent that it is, within the opinion of the Commanding Officer of the United States Coast Guard vessel, safe and practicable, each person aboard an interdicted vessel shall be spoken to by an INS officer, through an interpreter. A log record shall be maintained of each such person, based on their responses to the following inquiries:

1. Name;
2. Date of Birth;
3. Nationality;

4. Home Town (obtain sufficient information to enable a later location of the individual to check on possible persecution);

5. All Documents or Evidence Presented;

6. Why did you leave Haiti;

7. Why do you wish to go to the United States;

8. Is there any reason why you cannot return to Haiti?

B. A copy of the log prepared by the INS officers shall be provided to the Commanding Officer of the Coast Guard vessel.

C. INS officers shall be constantly watchful for any indication (including bare claims) that a person or persons on board the interdicted vessel may qualify as refugees under the United Nations Convention and Protocol.

D. If there is any indication of possible qualification for refugee status by a person or persons on board an interdicted vessel, INS officers shall conduct individual interviews regarding such possible qualification.

E. Interviews regarding possible refugee status shall be conducted out of the hearing of other persons.

F. If necessary, INS officers will consult with Department of State officials, either on board, or via radio communications.

G. Individual records shall be made of all interviews regarding possible qualification for refugee status.

H. If the interview suggests that a legitimate claim to refugee status exists, the person involved shall be removed from the interdicted vessel, and

his or her passage to the United States shall be arranged.

I. Individual record folders shall be prepared and maintained by INS officers in every case where a person is being sent on to the United States, and such record folder may be used to support such person's claim in the United States. (The individual folder shall contain a sworn statement by the applicants concerning the claim).

In September, 1981, the Coast Guard began interdicting vessels suspected of carrying undocumented aliens leaving Haiti bound for the United States. Upon interdiction of the boats, the passengers were interviewed by INS officials to determine their status. If the passengers were determined to be economic migrants, and not refugees, they were repatriated to Haiti. If they were determined to have a possible claim to political asylum, they were brought to the United States to continue the asylum process. Over the ten year period from 1981 to September, 1991, over twenty-five thousands migrants were interdicted.

On September 30, 1991, the democratically elected President of Haiti, Jean-Bertrand Aristide, was overthrown in a military coup. Following the coup, the United States suspended the interdiction program. Also, economic sanctions were imposed against Haiti. As a result of the coup and the economic sanctions, migration from Haiti increased.

On November 18, 1991, the United States announced that it would resume its interdiction and repatriation program. The next day, November 19, the Haitian Refugee Center, Inc. (HRC) filed a complaint seeking declaratory and injunctive relief in the

United States District Court for the Southern District of Florida. The defendants named are James Baker, III, Secretary of State; Rear Admiral Robert Kramek and Admiral Kime, Commandants, United States Coast Guard; Gene McNary, Commissioner, Immigration and Naturalization Service; and the United States.

HRC sought a temporary restraining order enjoining the defendants from repatriating Haitians not identified as candidates for political asylum until the implementation of procedures adequate to protect Haitians qualifying for asylum. The complaint alleges that the defendants have failed to follow INS rules and procedures that were intended to protect against the forced return to Haiti of interdictees with potentially valid claims to political asylum. The complaint further alleges that the defendants' actions violated the terms of the Executive Order 12324, the INS Guidelines promulgated pursuant to the order, and rules of international law, including Article 33 of the Protocol. Further, the complaint alleges that the defendants' actions deprived the interdictees of the protections set forth in the Refugee Act of 1980, the Immigration and Nationality Act (INA), and the due process protections of the Fifth Amendment of the Constitution. More specifically, the complaint alleges that interviews conducted on Coast Guard cutters were often as short as five minutes, were not conducted in private, and were conducted at a time when the Haitians suffered from a lack of adequate food and water and were otherwise in no condition for an adequate interview. Finally, the plaintiffs allege that the officers conducting the interviews were inadequately educated with respect to the political situation in Haiti to make sound judgments regarding claims for asylum.

The district court granted HRC's application for a temporary restraining order on November 19, 1991. The temporary restraining order precluded the defendants from repatriating Haitians on board U.S. flagged vessels or Haitians being held on land under United States control and at Guantanamo Bay, Cuba. The stated purpose of the order was to maintain the status quo "until further order."

On November 20, 1991, the defendants filed a motion to vacate the temporary restraining order or to stay the order pending appeal. These motions were denied by the district court on November 21, 1991. The district court granted plaintiffs' motion to expedite discovery and set a preliminary injunction hearing for November 27, 1991[1].

On December 3, 1991, the district court granted the plaintiffs' motion for a preliminary injunction. The district court's order was grounded on a finding that there was a substantial likelihood that the plaintiffs would prevail on the merits of two judicially enforceable claims: (1) "HRC's right of association and counsel, which arises from the First Amendment to the United States Constitution;" and (2) "the Haitian plaintiffs' right of non-refoulement, which arises under Article 33 of the 1967 United Nations Protocol Relating to the Status of Refugees."

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[1] The defendants filed an emergency appeal of the district court's temporary restraining order, filed a petition for a writ of mandamus, and sought a stay of the expedited discovery order. On November 21, this court stayed the district court's discovery order. On November 22, this court lifted the stay of discovery, dismissed the appeal of the temporary restraining order for want of jurisdictions, and denied the petition for a writ of mandamus.

After determining that the plaintiffs had shown a substantial likelihood of success on these two claims, the district court went on to conclude that there was no substantial likelihood of sucecss on the plaintiffs' remaining claims under the Fifth Amendment, the Executive Order, the INS Guidelines, the Refugee Act, the INA, and the APA.

First, the court followed settled law and found that these Haitian interdictees, who were not present in the United States, had no rights under the United States Constitution and therefore their Fifth Amendment claim must fail. Second, the court concluded that the protections afforded by the Refugee Act and the INA were limited "by the very terms of the statutes" to aliens within the United States. Therefore, the Haitian interdictees had no enforceable claim on these grounds. Third, the district court found that the Executive Order created no independent right of action and that the INS Guidelines were more akin to internal operating procedures and thus could not form the basis for a judicially enforceable claim. Finally, the district court concluded there was no substantial likelihood of the plaintiffs succeeding on their APA claim. The court concluded that the actions in question were committed to agency discretion and thus not reviewable under the APA.

The defendants appealed that part of the district court's order granting injunctive relief on HRC's First Amendment claim and claim under Article 33 of the Protocol. This court expedited the appeal. We held that Article 33 of the Protocol is not self-executing and therefore did not give rise to any rights enforceable by the plaintiffs. We further held that the First Amendment claim did not support the injunction. We held that HRC asserted a right of

access to the interdictees while the relief granted by the district court enjoined repatriation of the Haitians. Because the relief granted did not address the right asserted, the First Amendment claim did not support the injunction. We then dissolved the injunction and remanded the case to the district court with instructions to dismiss on the merits the claim based upon Article 33 of the Protocol. *Haitian Refugee Center, Inc. v. James Baker, III, Secretary of State*, 949 F.2d 1109 (11th Cir.1991). The court's mandate issued December 17, 1991.

Later that night the district court issued what purported to be another temporary restraining order. The district court had changed its mind since issuing its December 3, 1991 order and found that the plaintiffs had shown a substantial likelihood of success on their claim under the APA. The defendants filed an immediate appeal and motion for a stay pending appeal, arguing that the temporary restraining order was in effect a preliminary injunction. We agreed, concluded that we had jurisdiction and, pursuant to Fed.R.App.P. 8, stayed the order pending appeal. *Haitian Refugee Center, Inc. v. James Baker, III, Secretary of State*, 950 F.2d 685 (11th Cir.1991).

On December 20, 1991, after a hearing at which plaintiffs requested preliminary injunctive relief under the First Amendment, the Executive Order, the Refugee Act, and the INA, the district court granted "Limited Preliminary Injunctive Relief" based on HRC's claimed First Amendment right of access to the interdicted Haitians. In this order, the district court barred repatriation of the interdicted Haitians until plaintiffs' counsel was given meaningful access to the interdictees subject to reasonable, content-neutral, time, place, and manner restrictions. *Haitian*

Refugee Center, Inc. v. Baker, No. 91-2653-CIV (S.D. Fla. filed Dec. 20, 1991) (order granting limited preliminary injunctive relief). The district court denied injunctive relief based on the plaintiffs' asserted rights under the Executive Order, the INA, and the Refugee Act, finding that the plaintiffs had failed to show a substantial likelihood of success on these claims. *Id.* The defendants immediately appealed that part of the order granting relief on the plaintiffs' First Amendment claim. The plaintiffs filed a cross-appeal challenging that part of the order denying relief on the claims predicated upon the Executive Order, the INA, and the Refugee Act. This appeal and cross-appeal are docketed in this court as No. 91-6105.

On December 23, 1991, following a hearing on the plaintiffs' request for a preliminary injunction based on the APA, the district court entered an order supplementing its December 20, 1991 order. This supplemental order granted the plaintiffs' request and enjoined the defendants from forcibly repatriating the Haitian interdictees pending resolution of plaintiffs' claims on the merits or until suitable procedures were implemented. The district court stayed this order pending appeal. The defendants' appeal of this supplemental order is docketed in this court as No. 91-6118.

We consolidated the defendants' appeal of the district court's December 17, 1991 order purporting to grant a temporary restraining order under the APA (No. 91-6099), their appeal of the December 20, 1991 order granting preliminary injunctive relief under the First Amendment (No. 91-6105), and their appeal of the December 23, 1991 supplemental order granting

preliminary injunctive relief under the APA (No. 91-6118). These consolidated appeals have been expedited and are now ripe for decision.

II. ISSUES ON APPEAL

1. Whether the district court erred in granting preliminary injunctive relief on the plaintiffs' claim that the APA authorizes judicial review of the defendants' actions under the law embodied in the Protocol, the Executive Order, the INA, the Refugee Act,[2] and the INS Guidelines.

2. Whether the district court erred in denying preliminary injunctive relief on the plaintiffs' claims to independently enforceable rights under the Executive Order, the INA, the Refugee Act, the INS Guidelines, and customary international law.

3. Whether the district court erred in granting preliminary injunctive relief on the plaintiffs' claimed right of access under the First Amendment.

III. STANDARD OF REVIEW

The grant of a preliminary injunction is reviewed for abuse of discretion. However, if the trial court misapplies the law we will review and correct the error without deference to that court's determination. *Guaranty Fin. Servs., Inc. v. Ryan*, 928 F.2d 994, 998 (11th Cir.1991); *Tally-Ho, Inc. v. Coast*

[2] Although the plaintiffs assert a claim under the INA *and* the Refugee Act of 1980, we view their claim to be based on the INA as it has been amended by the Refugee Act of 1980. More specifically, we view their claim to be based primarily on 8 U.S.C. § 1253(h) as it was amended by the Refugee Act of 1980 and 8 U.S.C. § 1158(a) which was added to the INA by the Refugee Act.

Community College Dist., 889 F.2d 1018, 1022 (11th Cir.1989).

IV. JUDICIAL REVIEW UNDER THE APA

The plaintiffs contend that the APA authorizes review of their claims that repatriation violates the law embodied in the United Nations Protocol, the Executive Order, the INA, and the INS Guidelines. We disagree.

The plaintiffs claim that they have a right to judicial review of the defendants' compliance with the INA through the APA. We conclude that such review is precluded by the INA.

The INA expressly creates extensive rights of review regarding asylum claims and withholding of deportation claims, but only for aliens who have reached our borders. The INA provides no such provisions for review at the behest of aliens beyond our border. This leads us to conclude that Congress intended to bar review to aliens similarly situated to the plaintiffs in this case.

The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review." 5 U.S.C. § 702. However, judicial review under the APA is not available where "statutes preclude judicial review," 5 U.S.C. § 701(a)(1), or where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

In order to determine whether Congress intended to preclude judicial review under the APA, the courts look not only at the express language of the statute but the statutory scheme as a whole. *Block v.*

Community Nutrition Institute, 467 U.S. 340, 345, 104 S.Ct. 2450, 2454, 81 L.Ed.2d 270 (1984). The presumption favoring judicial review of administrative action may be overcome by Congressional intent inferred from contemporaneous judicial construction barring review and Congress's acquiescence in it. *Block*, 467 U.S. at 349, 104 S.Ct. at 2455.

In this case, judicial review under the APA is foreclosed because the relevant provisions of the INA provide the sole and exclusive avenue for judicial review. Plaintiffs claim that the defendants have violated 8 U.S.C. § 1253(h) and contend that the defendants' determination is reviewable under the APA.

Section 1253(h) provides as follows:

> The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

Section 1253(h) is included in Part V of the INA, which deals with deportation of aliens. The provisions of Part V dealing with deportation only apply to aliens within the United States. Therefore, 8 U.S.C. § 1252(b), which sets out the procedures for determining deportability of an alien, and which is also included in Part V of the INA, applies only to aliens "in the United States." 8 U.S.C. § 1251. Further, 8 U.S.C. § 1105a provides the exclusive procedure for judicial review of all final orders of deportation made pursuant to section 1252(b). Section 1105a provides in relevant part:

> The procedure prescribed, and all the provisions of chapter 158 of Title 28 shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against *aliens within the United States* pursuant to administrative proceedings under section 1252(b) of this title or compatible provisions of any prior Act, . . .

8 U.S.C. § 1105a(a) (emphasis added).

Contrary to the extensive procedures provided for with regard to aliens within the United States, 8 U.S.C. § 1157, which applies to refugees seeking admission from outside the United States, makes no provision for judicial review. Section 1157, as amended, gives the Attorney General discretion, within numerical limits, to permit refugees who are overseas to immigrate to the United States. No judicial review is provided for. The extensive procedures set out in section 1252(b) and the procedures for judicial review provided for pursuant to section 1105a, along with the absence of procedures for judicial review provided in section 1157, demonstrate a Congressional intent to preclude judicial review at the behest of aliens beyond the borders of the United States.

The conclusion that no right to judicial review exists for aliens who have not presented themselves at the borders of this country is supported by case law. In *Brownell v. Tom We Shung*, 352 U.S. 180, 77 S.Ct. 252, 1 L.Ed.2d 225 (1956), the Supreme Court held that exclusion orders may be challenged, only by habeas corpus, but by declaratory judgment action. The Court, however, limited its holding by stating that: "We do not suggest, of course, that an alien who has never presented himself at the borders of this

country may avail himself of the declaratory judgment action by bringing the action from abroad." *Id.* at 184 n. 3, 77 S.Ct. at 255 n. 3.

In *Braude v. Wirtz*, 350 F.2d 702 (9th Cir.1965), 181 Mexican nationals brought suit to challenge an administrative determination denying them visas to enter the United States. The court held that these Mexican nationals, who had never sought admission at the borders of the United States, had no right to judicial review of the denial of their visas. In so holding the court cited the Supreme Court's language in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 70 S.Ct. 309, 94 L.Ed. 317 (1950). In *Shaughnessy*, the Supreme Court stated:

> When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.
>
> Thus the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. The action of the executive officer under such authority is final and conclusive. Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court unless expressly authorized by law to review the determination of the political branch of the Government to exclude a given alien.

338 U.S. at 542-43, 70 S.Ct. at 312.

In *Cobb v. Murrell*, 386 F.2d 947 (5th Cir.1967),[3] the Fifth Circuit followed *Braude* and held that a Mexican alien outside the United States without a visa had no standing to challenge a determination of the Secretary of Labor denying her a visa. The court went on to state that "Congress can make an administrative officer the apogee of finality, and no constitutional safeguard requires judicial review in denying entry to aliens." *Id.* at 951.[4]

Finally, in *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970 (9th Cir.1986), the Ninth Circuit affirmed the district court's dismissal of the case for lack of jurisdiction to review the acts of consular officials in denying visas. The court stated that the power of Congress to exclude aliens altogether from the country or to prescribe the conditions of such entry and to have its declared policy in that regard enforced exclusively through the executive branch, without judicial interference, is well settled. *Id.* at 971 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 766, 92 S.Ct. 2576, 2583, 33 L.Ed.2d 683 (1972).

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[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[4] Plaintiffs argue that *Estrada v. Ahrens*, 296 F.2d 690 (5th Cir.1961), supports their position that the APA should be applied in this case. *Estrada* dealt with an alien who held a valid visa and subsequently was refused entry. In this case the plaintiffs have never reached the United States so *Estrada* is not controlling. Further, the court in *Estrada* distinguishes the facts of its case from those of an alien initially applying for a visa. The court stated that "an alien initially applying for a visa, however, may be summarily turned down by the American consul. Such refusal is usually considered immune to judicial review." *Id.* at 692 n. 2.

The foregoing cases evidence Congress's intent to preclude judicial review of administrative determinations concerning aliens who have never presented themselves at the borders of the country. Review under the APA would be inconsistent with that intent.

Assuming, *arguendo*, that the action in question is within the scope of the APA, the government argues that APA review is nevertheless barred by 5 U.S.C. § 701(a)(2). Section 701(a)(2) provides that the APA does not apply where "agency action is committed to agency discretion by law." This exception, however, is very narrow. It is applicable only when the statute granting agency discretion is so broad that it provides no law for courts to apply when reviewing the agency action. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 821, 28 L.Ed.2d 136 (1971).

8 U.S.C. § 1182(f) clearly grants the President broad discretionary authority to control the entry of aliens into the United States. Section 1182(f) grants the President the discretion to act to exclude aliens "as he deems necessary." Pursuant to this power, President Reagan issued Executive Order 12324 authorizing the interdiction of illegal aliens at sea. HRC concedes that the President's order is not reviewable under the APA. They argue that the President's subordinates are not carrying out his directive and that their failure to do so is subject to judicial review[5]. Further, they argue that the defendants' actions violate 8 U.S.C. § 1253(h), which provides that the At-

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[5] The logical extension of this argument would make all of the President's discretionary decisions subject to review except in matters he can personally execute without the assistance of subordinates.

torney General shall not deport or return an alien if it is determined that he will be subject to persecution. Their claim, however, is not based on a challenge to any individual determination made by the INS officers. Rather, the plaintiffs challenge the procedure used to interview the interdictees in order to determine which ones are subject to being repatriated.

We begin by noting that this court's decision in *Greenwood Utilities Comm'n v. Hodel*, 764 F.2d 1459 (11th Cir.1985), appears to bar HRC's claim. In *Greenwood*, a panel of this court held that "[o]nly if a specific *statute* somehow limits the agency's discretion to act is there sufficient 'law to apply' as to allow judicial review." *Id.* at 1464 (emphasis added). Neither § 1182(f), § 1253(h) nor any other act of Congress relied on by the plaintiffs provide any guidance regarding the procedures to be used in making repatriation decisions with respect to aliens who have not yet reached the United States. Without such congressionally-mandated limits on agency authority, it is inappropriate for this court to exercise judicial review over the operation of the executive branch.

In a decision which appeared shortly after *Greenwood*, however, another panel of this court suggested in a footnote that "[e]ven when a decision is committed to agency discretion, a court may consider allegations that an agency failed to follow its own binding regulations." *Florida, Dep't of Business Regulation v. United States Dep't of the Interior*, 768 F.2d 1248, 1257 n. 11 (11th Cir.1985), *cert. denied* 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1968). Although the *Florida, Dep't of Business Regulation* panel did not address *Greenwood* and relied instead upon an earlier Third Circuit decision, we will apply

the panel's analysis in *Florida, Dep't of Business Regulation* to this case.

HRC claims that INS and Coast Guard officials are violating Executive Order 12324's requirement that "no person who is a refugee will be returned without his consent." This command, however, in no way limits the discretion of INS officials in their determination of who qualifies as a refugee or the procedures to be used to make such a determination. It does not identify any specific factors to be considered or suggest how competing interests must be balanced. The determination of refugee status rests solely with the INS official. Since the Order does not constrain that official's discretion, it cannot provide this court with any "meaningful standard against which to judge the [official]'s exercise of discretion." *See Heckler v. Chaney*, 470 U.S. 821, 830, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985).

HRC also argues that the INA, international treaties, and the INS Guidelines constrain INS officials' discretion in determining who is a refugee. The Executive Order does provide that the Attorney General shall ensure fair enforcement of immigration laws and strict observance of our international obligations. As noted above, however, the INA does not extend its protection to aliens who have never entered the United States. Furthermore, although Article 33 provides that no refugee will be returned to a country if he has a well-founded fear of persecution, it provides no standards against which to judge the procedures about which the plaintiffs complain. Finally, the INS Guidelines issued pursuant to Executive Order 12324 provide no meaningful standards for judicial review.

As with the Executive Order itself, the exercise of the INS officer's discretion in determining who has a legitimate claim to refugee status is in no way constrained by the INS Guidelines. There are, therefore, no "binding regulations" which limit agency discretion in such a way as to permit meaningful judicial review. *See Florida, Dep't of Business Regulation*, 768 F.2d at 1256-57.

Because the action in question is "committed to agency discretion," HRC's claim for APA review is also barred by 5 U.S.C. § 701(a)(2).

The conclusion that APA review is not available in this situation is supported by Supreme Court precedent. In the case of *Marcello v. Bonds*, 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107 (1955), the Supreme Court held that the APA was not applicable to deportation proceedings. *Marcello*, 349 U.S. at 308, 75 S.Ct. at 757. The Court discussed the case of *Wong Yang Sung v. McGrath*, 339 U.S. 33, 70 S.Ct. 445, 94 L.Ed. 616 (1950), in which it had held that the APA was applicable to proceedings under the Immigration and Nationality Act of 1917. *Marcello*, 349 U.S. at 306, 75 S.Ct. at 760. The Court noted that six months after their decision in *McGrath*, Congress legislatively overruled it by providing in a rider to the Supplemental Appropriation Act of 1951, 64 Stat. 1048, that proceedings concerning the expulsion and exclusion of aliens should not be governed by sections 5, 7 and 8 of the APA. *Id.* Next, the Court examined the procedures concerning deportation under the Immigration and Nationality Act of 1952 to determine if Congress had intended to have the APA apply to this new act. After a very detailed analysis of the deportation proceedings provided for in section 242

(b) of the then new Immigration Act, the Court stated that:

> Exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed in view of the statement in § 12 of the Act that modifications must be express. But we cannot ignore the background of the 1952 immigration legislation, its laborious adoption of the Administrative Procedure Act to the deportation process, the specific points at which deviations from the Administrative Procedure Act were made, the recognition in the legislative history of this adoptive technique and of the particular deviations, and the direction in the statute that the methods therein prescribed shall be the sole and exclusive procedure for deportation proceedings. Unless we are to require the Congress to employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act, we must hold that the present statute expressly supersedes the hearing provisions of that Act.

Marcello, 349 U.S. at 310, 75 S.Ct. at 762.

In a recent decision, *Ardestani v. INS*, —— U.S. ——, 112 S.Ct. 515, 116 L.Ed.2d 496 (1991), the Supreme Court interpreted its holding in *Marcello* and held that "Congress intended the provisions of the Immigration and Nationality Act of 1952 (INA), 66 Stat. 163, as amended, 8 U.S.C. 1101 *et seq.*, to supplant the APA in immigration proceedings." *Id.* at ——, 112 S.Ct. at 518.

V. OTHER MISCELLANEOUS CLAIMS

Plaintiffs also claim that they have independent judicially enforceable rights under the Executive Order, the INS Guidelines, and the INA, as it was amended by the Refugee Act of 1980. In its order dated December 3, 1991, the district court refused to grant injunctive relief based on these claims and reiterated this holding in its order dated December 20, 1991 which granted limited preliminary injunctive relief on HRC's First Amendment claim. The plaintiffs cross-appeal, asserting that the district court erred in refusing relief on these other claims. For the reasons stated below, we agree with the district court's rulings on these issues.

A. *Plaintiffs' Claim under the INA and the Refugee Act*

The plaintiffs claim that they have judicially enforceable rights under the INA because the defendants' actions violate 8 U.S.C. § 1253(h) as it was amended by the Refugee Act. They argue that this section is applicable to them even though they have not reached the United States. They argue that the 1980 amendment to this section shows Congressional intent to extend the section's application.

Before this section was amended by the Refugee Act, § 1253(h) provided as follows:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

8 U.S.C. § 1253(h) (1976 ed.)

After the 1980 amendment, § 1253(h) was changed in relevant part as follows: "The Attorney General shall not deport *or return* any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country . . ." (emphasis added). Plaintiffs argue that because the amendment added the words "or return" and deleted the words "within the United States," Congress must have intended to expand the scope of the statute to include aliens beyond the borders of the United States. We disagree.

As discussed above in Section IV, section 1253(h) is found in Part V of the INA, which deals with deportation and adjustment of status. The provisions of Part V of the INA dealing with deportation only apply to aliens "in the United States." 8 U.S.C. § 1251, 1253(a); *Haitian Refugee Center, Inc. v. Gracey*, 600 F.Supp. 1396, 1404 (D.D.C.1985), *aff'd on other grounds*, 809 F.2d 794 (D.C.Cir.1987). The language of § 1253(h) was changed to conform with Article 33 of the Protocol. The plaintiffs in this case cannot avail themselves of any judicially enforceable rights under section 1253(h).

Finally, the INA's asylum provision which was added by the Refugee Act of 1980 is also limited by its terms to aliens in the United States or at its borders or a port of entry. Section 1158(a) states as follows:

> The Attorney General shall establish a procedure for *an alien physically present in the United States or at a land border or port of entry*, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is

a refugee within the meaning of section 1101 (a)(42)(A) of this title.

8 U.S.C. § 1158(a) (emphasis added).

We agree with the district court that the clear meaning of this language is that the plaintiffs in this case—who have been interdicted on the high seas—cannot assert a claim based on the INA or the Refugee Act.

Plaintiffs argue that the language of § 1158(a) should be read to include a land border or port of entry *or* its functional equivalent. Plaintiffs contend that because the United States Government is reaching out into the Caribbean to interdict them, it is effectively extending the borders to that extent. We decline to interpret the statute this broadly. The plain language of the statute is unambiguous and limits the application of the provision to aliens within the United States or at United States' borders or ports of entry. *See Haitian Refugee Center v. Gracey*, 600 F.Supp. 1396, 1404 (D.D.C.1985), *aff'd on other grounds*, 809 F.2d 794 (D.C.Cir.1987). The plaintiffs in this case have been interdicted on the high seas and have not yet reached "a land border" or a "port of entry." Therefore, their claims under the INA must fail.

B. *Plaintiffs' Claims under the Executive Order*

Congress has committed to the President broad authority to control the entry of aliens or of any class of aliens when he determines that it would be detrimental to the interests of the United States. 8 U.S.C. § 1182(f). The President may suspend or restrict the entry of aliens for the period he deems necessary and impose the restrictions he deems ap-

propriate. *Id.* Pursuant to this broad grant of authority, President Reagan issued Executive Order 12324.

The plaintiffs assert that the Executive Order provides a basis for a private cause of action that may be enforced by the district court pursuant to its federal question jurisdiction. Plaintiffs contend that the Executive Order embodies, and on its own terms sets forth, the law against forced return of political refugees. Specifically, the plaintiffs rely on the language in the Executive Order that says "no person who is a refugee will be returned without his consent."

Assuming that the district court has jurisdiction to review a claim based on the Executive Order, plaintiffs still must state a cause of action on which relief can be granted. *See Farkas v. Texas Instrument, Inc.*, 375 F.2d 629 (5th Cir.), *cert. denied* 389 U.S. 977, 88 S.Ct. 480, 19 L.Ed.2d 471 (1967). We hold that the Executive Order does not give rise to a private cause of action.

The Executive Order was issued specifically to establish a procedure for interdiction of Haitian migrants on the high seas. The program was intended as an emergency measure to deal with a situation that the President determined to be detrimental to the interests of the United States. By its terms, the Executive Order envisioned a procedure taking place entirely on the high seas. It contemplated a procedure that could quickly screen those on board interdicted boats and determine who had potential claims of persecution that would prevent repatriation. Because of the nature of the screening process and the fact that it was to take place on the high seas, it could not have been the intention of the President to allow the interdictees to initiate judicial review of

their cases in the district courts of the United States. A private civil action was not contemplated under Executive Order 12324 and the plaintiffs' claim based on this order does not state a claim upon which relief can be granted.

C. *Plaintiffs' Claim under the INS Guidelines*

Plaintiffs also contend that they have substantive rights under the INS Guidelines which are being violated by the defendants' actions in this case. We disagree. The INS Guidelines, as discussed above, create no substantive rights that can be judicially enforced. The guidelines are more akin to internal operating instructions as opposed to regulations. As such, they do not have the force and effect of law. *Pasquini v. Morris*, 700 F.2d 658 (11th Cir.1983); *Dong Sik Kwon v. INS*, 646 F.2d 909 (5th Cir.1981).

In *Pasquini*, this court analyzed an internal operating instruction of the INS, O.I. 103.1(a)(1)(ii), and determined that the INS's internal operating instructions came within the exception to the APA's procedure for publication in the Federal Register of all proposed rulemaking by administrative agencies.

Section 553(b) of the APA provides, with certain exceptions not applicable here, that the publication procedures do not apply "to interpretive rules, general statements of policy, or rules of agency organization, procedure or practice . . ." 5 U.S.C. § 553(b). The court concluded that internal operating instructions fell within this category "since the INS considers such instructions to be internal directives, not having the force and effect of law as do regulations." *Pasquini*, 700 F.2d at 662 (citing *Dong Sik Kwon*, 646 F.2d at 918) (internal quotes omitted). Finally, the court held that "[t]he internal operating procedures of the INS are for the administrative convenience of the INS only." *Id.*

We hold that the INS Guidelines in this case are internal guidelines for employees of the INS. These Guidelines were sent in the form of a memorandum to INS employees assigned to duties relating to the interdiction program. They were not intended to grant substantive rights but were only intended to give guidance to those INS employees involved in the interdiction program. The district court correctly denied injunctive relief based on this claim.

The plaintiffs also claim that customary international law, or international common law, creates enforceable rights. This claim is meritless and does not warrant discussion.

VI. HRC's FIRST AMENDMENT RIGHT OF ACCESS

One of the grounds relied upon by the district court in issuing the December 3, 1991 preliminary injunction against repatriation of the interdicted Haitians was HRC's claimed First Amendment right of access to those Haitians.[6] This court vacated that preliminary injunction on December 17, 1991. At that time we did not address HRC's First Amendment claim on the merits. Rather, this court held that HRC's purported First Amendment right of access to the Haitians could not support the preliminary injunction because the injunction merely barred repatriation and did not grant the access sought.

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[6] We agree with the district court's conclusion that the Haitian refugees do not have correlative First Amendment rights of their own. *See* Dec. 3, 1991 Memorandum Order at 44.

> The injunctive relief granted by the district court does not require the defendants to allow HRC access to the Haitian interdictees, it enjoins the defendants from repatriating them. Because the relief granted does not address the right of access asserted by HRC, the First Amendment claim cannot support the injunction.

Haitian Refugee Center v. Baker, 949 F.2d 1109, 1111 (11th Cir.1991).

On remand, the district court reiterated its conclusion that HRC has a First Amendment right of access to the interdicted Haitians. The court found that, with respect to Guantanamo Bay Naval Station, HRC sought access to portions of the installation which were being used for the non-military purpose of detaining refugees. Dec. 20, 1991 Order at 9. The district court also found that HRC lacked alternative means of exercising its First Amendment right other than direct access to the interdicted Haitians in United States custody. *Id.* The court then issued the following injunctive relief:

> [F]or the reasons described in section III, plaintiffs' request for an injunction ordering defendants to grant plaintiffs' access to the interdicted class members is *GRANTED* as follows: defendants shall grant plaintiffs' counsel meaningful access to its interdicted class members, before repatriation, subject to reasonable, content-neutral, time, place and manner restriction. . . .

Id. at 11.

On appeal, the United States argues that HRC has no First Amendment right whatsoever to communicate with aliens being held outside the United States. The government also maintains that the district

court's preliminary injunction is overly broad and imposes affirmative obligations on the United States. HRC, on the other hand, claims that "[t]he denial of access to the emigrees [sic] on Coast Guard cutters and at Guantanamo Bay Naval Station violates the rights of the HRC, whose organizational purpose has been thwarted in that it has been unable effectively to provide assistance to the refugees including legal assistance and information concerning their legal rights."[7] HRC also argues that the issue of whether the preliminary injunction requires access to Coast Guard ships is not ripe for review since the district court has not resolved this question. Because we can find no support for its claim in the laws or Constitution of the United States, we hold that HRC has failed to state a claim upon which relief can be granted.

The cases that the district court relies upon to justify its conclusion that HRC is likely to prevail in its First Amendment claim—*NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963), and *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978)—do not recognize a right of access to persons properly in government custody. In *Button*, the National Association for the Advancement of Colored People (NAACP) challenged a Virginia statute that proscribed "the improper solicitation of any legal or professional business." 371 U.S. at 419, 83 S.Ct. at 331. The Supreme Court of Virginia had interpreted this statute as prohibiting "any

[7] The district court noted that there was no allegation that the government's denial of access to the interdicted Haitians was the product of viewpoint discrimination. See Dec. 3, 1991 Memorandum Order (incorporated into Dec. 20, 1991 Order at 8).

arrangement by which prospective litigants are advised to seek the assistance of particular attorneys." *Id.* at 433, 83 S.Ct. at 338. This ban encompassed the NAACP's efforts to encourage others to bring suits, with the assistance of the NAACP's legal staff, challenging segregation in Virginia's public schools. *Id.* at 426, 83 S.Ct. at 334. The United States Supreme Court held "that the activities of the NAACP [soliciting prospective litigants] . . . are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not *prohibit*, under its power to regulate the legal profession. . . ." *Id.* at 428-29, 83 S.Ct. at 335 (emphasis added). Thus, the Court held that the statute, as applied to the NAACP, unconstitutionally infringed the organization's rights of free speech and association. *Id.*

Similarly, in *In re Primus*, the Supreme Court held that the South Carolina Supreme Court had unconstitutionally infringed the associational rights of an American Civil Liberties Union (ACLU) staff attorney by publicly reprimanding her after she solicited a potential litigant by mail on behalf of the ACLU. 436 U.S. at 439, 98 S.Ct. at 1908. The potential litigant had been sterilized as a condition of receiving public medical assistance. *Id.* at 415, 98 S.Ct. at 1896. The Court noted that "[t]he First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights,'" *Id.* at 432, 98 S.Ct. at 1904-05 (quoting *Button*, 371 U.S. at 437, 83 S.Ct. at 340). Finding that "[t]he ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public," *id.* 436 U.S. at 431, 98

S.Ct. at 1904, the Court concluded that South Carolina's disciplinary rules could not constitutionally be applied to the ACLU attorney's solicitation of a potential litigant by letter since that solicitation was "intended to advance beliefs and ideas." *Id.* at 438 n. 32 & 439, 98 S.Ct. at 1908 & n. 32.

Button and *In re Primus* recognize a narrow First Amendment right to associate for the purpose of engaging in litigation as a form of political expression. This right is predicated upon the existence of an underlying legal claim that may be asserted by the potential litigant. *See Button*, 371 U.S. at 440, 83 S.Ct. at 341 ("the exercise . . . of First Amendment rights to enforce constitutional rights through litigation, as a matter of law, cannot be [prohibited]"). In the present case, the interdicted Haitians have no recognized substantive rights under the laws or Constitution of the United States.[8] Thus, it would be nonsensical to find that HRC possesses a right of access to the interdicted Haitians for the purpose of advising them of their legal rights.

Even assuming *arguendo* that HRC has some limited right to associate with interdicted Haitians who are detained outside of the United States and who themselves have no substantive rights enforceable in the United States, this right of association would not

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[8] The district court previously concluded that the interdicted Haitians have no rights under the United States Constitution. *See* Dec. 3, 1991 Memorandum Order at 44. Today, we express agreement with that conclusion. *See ante* at 1511 n. 6. Moreover, we decide today that the interdicted Haitians have none of the substantive rights—under Executive Order No. 12324, the 1967 United Nations Protocol Relating to the Status of Refugees, the Immigration and Naturalization Service Guidelines, the Refugee Act of 1980, the Immigration and Nationality Act, or international law—that they claim for themselves or that the HRC claims for them. *See ante* at 1514-15.

give rise to the right of access that HRC claims. In reality, HRC's claim is that it has a right to associate with the interdicted Haitians and it has a right to compel the Government to assist it in exercising that right. The Constitution, however, does not require the Government to assist the holder of a constitutional right in the exercise of that right. *Ukrainian-American Bar Ass'n. v. Baker*, 893 F.2d 1374, 1381 (D.C.Cir.1990); *see also DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989) ("the Due Process clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual"); *Harris v. McRae*, 448 U.S. 297, 317-18, 100 S.Ct. 2671, 2688-89, 65 L.Ed.2d 784 (1980) ("[a]lthough the liberty protected by the Due Process Clause affords protection against unwarranted government interference . . ., it does not confer an entitlement to such [government assistance] as may be necessary to realize all the advantages of that freedom"). Thus, associational freedom in no way implies a right to compel the Government to provide access to those with whom one wishes to associate. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 9 & 15, 98 S.Ct. 2588, 2594 & 2597, 57 L.Ed.2d 553 (1978) (acknowledging that the media has a right to communicate information once it is obtained yet holding that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control"). Certainly, neither *Button* nor *In re Primus* supports the conclusion that the Government infringes associational freedom when it denies access to those whom it lawfully detains.

The district court's preliminary injunction extends to grant HRC access to Haitians aboard Coast Guard ships at sea. As noted above, HRC suggests that we need not address this issue until the district court has resolved the entire First Amendment claim on its merits. The preliminary injunction, however, clearly raises this question. By its terms, the injunction extends to all "interdicted class members." These class members are being held both at Guantanamo Bay Naval Station and on Coast Guard cutters. The order is in no way limited to those Haitians at Guantanamo. It is equally applicable to those interdictees currently on Coast Guard ships, as well as those who may be on board Coast Guard ships in the future. Indeed, under the injunction the United States may not repatriate the Haitians aboard Coast Guard ships until HRC has been granted access to them. We also note this relief is consistent with that sought by HRC in its amended complaint, which specifically requests access to Haitians both at Guantanamo and on Coast Guard ships.

Providing access to these ships would impose a substantial burden on the United States. Such access would interfere with the ships' "intended purposes" of interdicting and screening the Haitian migrants and returning those deemed to be ineligible for refugee status. Coast Gaurd officials would be forced to either remove the ship from the theater of operation or suffer the presence of untrained civilians while conducting their mission. In order to provide access to the Haitians aboard the Coast Guard cutters, the United States must put the Haitians ashore at Guantanamo, in the United States, or elsewhere or, alternatively, transport HRC representatives to the ships

themselves. Either way, the United States is forced to assist HRC and subsidize the pursuit of its objectives.

Similarly, with reference to the Haitians being held at Guantanamo Bay Naval Station, the United States must hold the interdicted Haitians in custody—at tremendous expense to the American taxpayer—to assist HRC in its right to "meaningful access." Presumably, the government is also obligated to provide HRC representatives with transportation to and from Guantanamo, as well as shelter and other necessities while they are there.

Directly on point is *Ukrainian-American Bar Ass'n*. In that case, the Ukrainian-American Bar Association (UABA) brought suit to establish its "rights of access to [Soviet aliens seeking asylum in the United States] under the First Amendment to counsel such individuals regarding their Constitutional and statutory right to apply for political asylum." 893 F.2d at 1377. The United States Court of Appeals for the D.C. Circuit framed the issue presented as "whether the Government, once having acted to place [an] alien in custody, violates the first amendment rights of third parties when it declines to make provision for them to contact him." *Id.* at 1381. The court acknowledged that *Button* and *In re Primus* recognize a First Amendment right to solicit clients to engage in litigation as a form of political expression. *Id.* The court concluded, however, that the Government does not infringe that right when it refuses to provide access to an alien in its custody who is seeking political asylum:

> [W]hen an unadmitted alien is taken into custody for interrogation and "immediate action,"

> his entrance into custody does not infringe the right of any third party—whether a lawyer or another with an interest in getting a message through to the alien—to engage in constitutionally protected political expression. . . .
>
> Furthermore, the Government does not infringe a third party's first amendment right to associate with an alien by holding the alien for a period of time during which the third party is unable to contact him. The loss of the right of association while the alien is held incommunicado by the Government is not of constitutional significance; it is but an indirect consequence of the Government's pursuit of an important task, *viz.* resolving "immediate action" cases.

Id.

HRC does not assert that the Government seeks to repatriate the interdicted Haitians *in order to* interfere with HRC's associational freedom. Indeed, in light of the record before us, it would be absurd for HRC to make such an allegation. HRC's claim is, therefore, nothing more than a claim that it has a right to compel the Government to assist it in exercising a right of association. *Any* court order enforcing this so-called "right" would impose an inappropriate affirmative obligation on the Government. This is more than the Constitution requires. We hold, therefore, that HRC's claim to a right of access to the interdicted Haitians is not a claim upon which relief can be granted and instruct the district court on remand to dismiss it.

VII. CONCLUSION

Case No. 91-6099

The "temporary restraining order" issued on December 18, 1991, has expired by its terms. The appeal of that order, our Case No. 91-6099, is DISMISSED as MOOT.

Case No. 91-6105 and 91-6118

All injunctive orders issued by the district court in its Case No. 91-2653-CIV are VACATED. The case is REMANDED to the district court. The district court is instructed upon remand to dismiss the action because the complaint fails to state a claim upon which relief can be granted.

The mandate shall issue immediately.

INJUNCTION ORDERS VACATED; REMANDED WITH INSTRUCTIONS.

HATCHETT, Circuit Judge, dissenting:

I respectfully dissent. We should examine what is really involved in this case. Reading the majority opinion, one might suppose that many precedents and principles of law prevent the Haitian Refugee Center (HRC) from having meaningful access to the refugees at Guantanamo Bay and on Coast Guard vessels. In reality, that is not the case. The principal matters before this court are: (1) whether the refugees have rights under the Administrative Procedures Act (APA), and (2) whether HRC has a First Amendment right to meaningful access to the refugees.[1] The

[1] Other issues were brought to the court through HRC cross-appeal, but will not be addressed in this dissent due to the expedited nature of this case.

district court correctly ruled that (1) the refugees have the right under the APA to be properly interviewed, and (2) HRC has a First Amendment right of access in accordance with reasonable time, place, and manner limitations. Consequently, the district court ordered the government not to repatriate the refugees before HRC's representatives were given the opportunity to counsel them regarding their rights and status in the present situation. Although the district court allowed the government to impose strict limitations, the government has steadfastly refused to allow HRC meaningful access to the refugees, under any circumstances.

The majority cites many cases for many legal propositions, but when all is said and done, the majority simply accepts the government's contention that these refugees have no enforceable rights in an American court because they have not reached the continental United States. For the majority, that is the heart of the matter; the refugees are outside of the United States. The government makes the "outside the United States" argument, and the majority accepts it, although everyone in this case agrees that agencies of the United States captured the refugees and are holding them on United States vessels and leased territory. Moreover, the majority accepts this argument although everyone in the case agrees that the refugees are being prevented from reaching the shores of the continental United States.[2] The majority accepts a

[2] As stated in a previous dissent, the capture of Haitian refugees in international waters is authorized under a 1981 agreement between the Reagan administration and the totalitarian government of Jean-Claude "Baby Doc" Duvalier. The record does not disclose such an agreement with any other country.

pure legal fiction when it holds that these refugees are in a different class from every other "excludable alien" because Haitians, unlike other aliens from anywhere in the world, are prevented from freely reaching the continental United States.[3]

In addition to accepting this pure legal fiction, the majority fails to follow at least two well established principles of American law. First, from the beginning, the majority has proceeded as though called upon to decide the issues on the merits, rather than to review the appropriateness of the district court's entry of preliminary injunctions. Under our circuit's law, the majority should have reviewed the appropriateness of the district court's preliminary injunctions by considering whether HRC and the refugees have proved: (1) a substantial likelihood of prevailing on the merits of their claims; (2) a substantial threat of suffering irreparable injury in the absence of an injunction; (3) that the threatened injury to them outweighs the potential harm an injunction would cause the government; and (4) that the injunction would not be adverse to the public interest. *Haitian Refugee Center, Inc. v. Nelson*, 872 F.2d 1555 (11th Cir. 1989).

Secondly, the majority determines the issues on appeal as though they are purely matters of law, without considering the district court's findings of fact. For example, early in this case, the majority held that the district court's First Amendment *remedy* was too broad because the Guantanamo Naval Base is a military installation and military activities would be dis-

[3] This court noted in *Jean v. Nelson*, 727 F.2d 957, 961 n. 1 (11th Cir.1984) (en banc): "[A]liens who have reached our border but have not formally been admitted to the United States are described as 'excludable' . . . aliens."

rupted if a few lawyers visited the refugee compound.[4] To the contrary, the district court found that the refugees are being held in a portion of the base not used for military purposes. The record in this case shows that television reporters, church officials, political activists, congressmen, and a host of other people regularly visit the Haitian compound at Guantanamo, evidently without disrupting military operations.

Among the other district court findings the majority ignores, are the following: The refugees fled Haiti because of the overthrow of the legal government; *many face irreparable and even fatal injury*, if returned; the government's harms, if any, are monetary and speculative; low level officials are not screening according to the INS guidelines; screening procedures are inadequate; conditions in Haiti have worsened in the last month [November-December, 1991]; *refugees who have been returned have faced persecution*; the Haitian Red-Cross is under the control of the military; and the government continues to deny HRC's representatives access to the refugees. Had the majority seriously considered these factual findings and reviewed the preliminary injunctions under the proper standards, it would have concluded, as I do, that the preliminary injunctions were properly issued.

I. THE FIRST AMENDMENT CLAIM

In an earlier opinion, the majority stated that the injunction granted by the district court was too broad to serve the First Amendment right of access as-

[4] Surprisingly, at this stage of the case, the majority holds that HRC has no First Amendment rights.

serted by HRC. *HRC v. Baker*, 949 F.2d 1109, 1111 (11th Cir.1991). In its opinion today, the majority holds that HRC has no such right. While I concur in the majority's conclusion that HRC's right of access to the interdicted Haitians cannot compel the government to allow it aboard United States Coast Guard cutters on the high seas, I dissent from the remainder of the majority's opinion on the First Amendment issue.

As a reviewing court, we must clearly state the law. In *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc), a case the majority completely ignores, we did so. "The Supreme Court has repeatedly emphasized that counsel have a first amendment right to inform individuals of their rights, at least when they do so as an exercise of political speech without expectation of remuneration. . . ." 727 F.2d at 983. HRC asserts precisely such a right in this case. Yet, despite *Jean*, the majority concludes that HRC has no First Amendment right of access to the refugees, because the refugees themselves have no rights. One conclusion simply does not follow from the other. Nothing in *Jean* predicates HRC's First Amendment right of access to the Haitians on the existence of rights in the Haitians themselves. The majority reinterprets *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) and *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978) to find such a predicate which the holdings of those cases do not require.

The district court found that Guantanamo Bay Naval Base is replete with civilians and civilian functions. The base as a whole, however, is surely a non-public forum. *See Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976). The Supreme

Court stated the law governing First Amendment rights in non-public forums in *Perry Education Ass'n v. Perry Local Education Ass'n*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983):

> In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech *is reasonable and not an effort to suppress expression merely because public officials oppose the speakers view.*

460 U.S. at 46, 103 S.Ct. at 955 (emphasis added). Later in the opinion, the Court stated:

> Implicit in the concept of the non-public forum is the right to make distinctions in access on the basis of subject matter and speaker identity. . . . The touchstone for evaluating these distinctions is *whether they are reasonable in light of the purpose which the forum at issue serves.*

460 U.S. at 49, 103 S.Ct. at 957 (emphasis added). Thus, even in a non-public forum, restrictions on speech must be reasonable and not motivated solely by the government's opposition to the speaker's point of view. While the government may decide that its interests in reserving the non-public forum for its intended purposes require the complete exclusion of certain speakers, such as exclusion must be "reasonable in light of the purpose which the forum at issue serves." *Perry*, 460 U.S. at 46, 49, 103 S.Ct. at 955, 957.

The record reveals that the government has indeed discriminated against HRC based upon the content of its speech. The district court found that the government has "opened the camps to members of the

press and to representatives of the United Nations High Commission on Refugees." It has allowed access to the refugees to many individuals and groups. But, it has denied such access to the HRC lawyers who seek to assist the Haitians in understanding and navigating through the predicament in which our government placed them.

Applying the *Perry* standard to these facts, the district court did not err in holding that the government must allow HRC access to the Haitians at Guantanamo Bay, subject to appropriate time, place, and banner restrictions. First Amendment rights vary according to the specific characteristics of the forum. *Heffron v. Int'l Society for Krishna Consciousness*, 452 U.S. 640, 650-51, 101 S.Ct. 2559, 2565-66, 69 L.Ed.2d 298 (1981). Accordingly, such rights are broader in those parts of a military base used for nonmilitary functions than in areas utilized for purely military functions. *See Flower v. United States*, 407 U.S. 197, 92 S.Ct. 1842, 32 L.Ed.2d 653 (1972). The majority completely ignores the significance of the district court's finding that "the portions of the military installation to which HRC seeks access are not used for military purposes." The special master found that Guantanamo hums with civilian activity and is a "slice of America." Thus, the district court did not abuse its discretion in finding that the government's decision to exclude HRC from Guantanamo Bay was unreasonable in light of the "purpose which the forum at issue serves." *Perry*, 460 U.S. at 49, 103 S.Ct. at 957.

As the Supreme Court held in *Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972), an American citizen's First Amendment rights may not constrain the government's power to

exclude aliens from the United States. 408 U.S. at 768, 92 S.Ct. at 2584. In this case, however, HRC only asked for access to the Haitians, not their admission to the United States. I would uphold the district court's grant of a preliminary injunction temporarily staying repatriation of the Haitians under the general principle that federal courts may issue injunctions to preserve the status quo during litigation. *See, e.g., Hollon v. Mathis Independent School Dist.*, 491 F.2d 92, 93 (5th Cir.1974) (per curiam). While an appeal was pending in this case, the district court properly issued a limited preliminary injunction to ensure that HRC's First Amendment right was not circumvented by repatriation of the refugees pending expedited determination on the merits.

The majority is correct in holding that the government is not required to subsidize HRC's access to the Haitians. In order to allow HRC the access to which it is entitled under the First Amendment, however, the government may have to provide some assistance in this case that it would not be obligated to provide under more "normal" circumstances.[5] The district

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[5] None of the cases cited by the majority compel a different result. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989) and *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980) were both cases brought under the Due Process Clause and thus are not dispositive of the First Amendment claim asserted here. *Houchins v. KQED, Inc.*, 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978) is a case dealing with media access to government information and thus is also inapposite to the right asserted here. Finally, *Ukrainian American Bar Ass'n v. Baker*, 893 F.2d 1374, 1381 (D.C.Cir.1990) is inapplicable for two reasons. First, the plaintiffs in that case sought to require the government to provide information to excludable aliens. In this case, HRC

court must determine these factual matters. The majority's presumption that the government is "obligated" under the district court order "to provide HRC representatives with transportation to and from Guantanamo as well as shelter and other necessities while they are there," is completely unsupported by the record before this court. This appellate court may not make findings of fact, especially on matters not borne out by the record.

Finally, the majority opinion flouts a recognized canon of the legal profession. Lawyers must have access to their clients so they may advise them of potential rights and causes of action in American courts. Even if the clients have no such rights or causes of action, the lawyer is entitled to counsel the client regarding the legal situation and the available options. Instead, in this case, the majority holds that the Haitian refugees have no rights enforceable in American courts, and therefore they have no business meeting with lawyers. Thus, the majority deprives these non-English speaking Haitians, unschooled in the American legal system, of lawyers in a situation affecting their most fundamental interests, because of a prior determination that they have no rights to justify meeting with American lawyers. Obviously, such a determination of the Haitians' rights should be made only after they have received the benefit of counsel.

I would remand the case to the district court for it to make findings of fact regarding the scope of HRC's First Amendment right of access to the

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seeks only a removal of the government's bar on HRC's ability to communicate with the Haitians. Second, *Ukrainian American Bar Ass'n* is not the law of this circuit, unlike *Jean v. Nelson*, a case which the majority has completely ignored.

Haitians at Guantanamo Bay, to determine the appropriateness of time, place, and manner restrictions on that right, and to tailor the existing injunction to conform to its findings.

II. JUDICIAL REVIEW UNDER THE APA

A. BACKGROUND

After previously determining that the HRC would not prevail on the merits of an APA claim, the district court reconsidered the APA claim in light of this court's December 17, 1991 opinion and the briefs filed before this court. The district court, having the benefit of this court's opinion and a thorough briefing of the issue, recognized the significant distinction between "the President's discretion in establishing the program and subordinates' discretion or lack thereof in following program procedures and guidelines." The district court concluded that a court reviewing the actions of subordinates in carrying out the program would have meaningful standards against which to measure those actions. On appeal, the Eleventh Circuit majority reversed the district court on the basis of the district court's *previous* understanding of the APA issue which viewed the suit as challenging the broad grant of discretion to the President in establishing the interdiction program.

B. DISCUSSION

The majority holds that the APA provides no basis for HRC's claims, because the presumption of reviewability normally afforded agency action withers in the light of national security or foreign affairs concerns. Additionally, the majority holds that neither the

Executive Order nor the various international laws and statutory provisions upon which HRC relies provide any guidance regarding the procedures used in repatriation decisions. Because the APA provides for judicial scrutiny of the actions of low ranking government officials in order to determine if the officials are in compliance with Article 33 and the INS guidelines issued pursuant to Executive Order 12324, I would uphold the preliminary injunction on the APA claim.

Generally, the APA provides a cause of action to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Both Article 33 and Executive Order No. 12324 with its implementing INS guidelines charge executive officials with the enforcement of United States immigration law. The law prohibits the return of political refugees to a country where they face persecution because of their political views. The actions of lower level executive officials in the field are subject to judicial review under the APA in order to determine if the officials are complying with the law's mandate, unless the law itself precludes judicial review, or the actions of the executive officials have been committed to their discretion by law. *Compare* 5 U.S.C. § 706(2)(A) (providing the scope of judicial review) *with* 5 U.S.C. § 701(a) (providing exceptions to judicial review). HRC and the class of Haitians interdicted on the high seas can avail themselves of this judicial review if: (1) they satisfy the standard set out in 5 U.S.C. § 702, (2) the officials' actions are reviewable under 5 U.S.C. § 704 and (3) the officials' actions do not come under the exclusion provisions of 5 U.S.C. § 701(a)(1) and (2).

1. Refugees Satisfy Sections 702 and 704

First, a reviewing court must determine whether HRC and the class satisfy the standard of 5 U.S.C. § 702. Section 702 provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The majority implies that the APA does not apply to aliens outside the borders of the United States because such aliens are not "persons" for purposes of APA review. Nowhere in the language of the statute does it state that a "person" must be a United States citizen. In fact, the statutory definition of "person," defined at 5 U.S.C. § 551(2), broadly defines the word as an "individual, partnership, corporation, association, or public or private organization other than an agency." Since the language of the APA does not specify that persons bringing suit under the Act must be United States citizens, HRC should not be precluded from raising an APA claim on that basis. *See also Stone v. Export-Import Bank*, 552 F.2d 132, 136 (5th Cir. 1977), *cert. denied*, 434 U.S. 1012, 98 S.Ct. 726, 54 L.Ed.2d 756 (1978) (holding that foreign agency was a person); *Constructores Civiles De Centro America, S.A. v. Hannah*, 459 F.2d 1183, 1190 (D.C.Cir.1972) (holding that APA review concerning a project in Nicaragua was available to a Honduran corporation); *Estrada v. Ahrens*, 296 F.2d 690 (5th Cir. 1961) (noting that the APA "does not say 'any citizen.' It does not say 'any person physically present in the United States.' . . . [T]he emphasis is on the breadth of the coverage."). *O'Rourke v. United States Dept. of Justice*, 684 F.Supp. 716, 718 (D.D.C.1988) (hold-

ing that an Irish citizen imprisoned in his own country fell within the definition of "person" used in the APA); and *Neal-Cooper Grain Co. v. Kissinger*, 385 F.Supp. 769, 776 (D.D.C. 1974) (holding that "person" included Mexican government).

Next, a reviewing court must determine whether HRC is "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." 5 U.S.C. § 702. The actions of low ranking government officials charged with the duty of properly interviewing the refugees constitute agency action. *See* 5 U.S.C. § 701(b)(1); *see also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971). The district court found that the refugees interdicted on the high seas have "well founded fears of political persecution if returned to Haiti." Specifically, the district court found that the refugees will suffer irreparable injury in the absence of an injunction because the procedures the agency followed in screening them were inadequate to properly identify political refugees. Under the Executive Order with its implementing guidelines, Haitians interdicted on the high seas are to be returned to Haiti, unless they are political refugees. Therefore, HRC and the interdicted Haitian class have been adversely affected by the agency's action of failing to follow agency rules setting forth adequate procedures to identify and protect Haitians who are political refugees.

Low ranking government officials have failed to take the steps necessary to ensure the enforcement of the United States immigration laws as found in the Protocol and the Executive Order with its implementing INS guidelines. Thus, the Haitians interdicted on the high seas are "suffering legal wrong because of

agency action." *See* 5 U.S.C. § 702. Both the Protocol and the Executive Order with its implementing INS guidelines constitute the relevant United States law relating to the interdiction of Haitians on the high seas. 'As I have previously concluded, the subject matter, legislative history, and subsequent construction of the Protocol support the proposition that it is self-executing and binding upon the United States in accordance with Article VI of the United States Constitution. *See Haitian Refugee Center, Inc. v. Baker*, 949 F.2d 1109, 1113-14 (11th Cir. 1991) (Hatchett, J., dissenting'). Additionally, the Protocol's protections apply to refugees outside the continental United States. Thus, Haitians interdicted on the high seas outside the continental United States are entitled to the Protocol's protections. *See Haitian Refugee Center, Inc. v. Baker*, 949 F.2d at 1115-16.

The Executive Order, which is based upon the authority vested in the President by the Constitution and statutes of the United States, including sections 212(f) and 215(a)(1) of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. §§ 1182(f) and 1185(a)(1), is accorded the force and effect of a statute enacted by Congress. *See Farkas v. Texas Instruments*, 375 F.2d 629, 632 (5th Cir.), *cert. denied*, 389 U.S. 977, 88 S.Ct. 480, 19 L.Ed.2d 471 (1967); *see also Legal Aid Society of Alameda City v. Brennan*, 608 F.2d 1319, 1329-30 n. 14 (9th Cir. 1979), *cert. denied*, 447 U.S. 921, 100 S.Ct. 3010, 65 L.Ed.2d 1112 (1980). Since the low ranking government officials' actions violate these laws, the Haitians interdicted on the high seas are aggrieved by agency action within the meaning of relevant law. *See* 5 U.S.C. § 702. Thus, HRC and the refugees satisfy the requirements of 5 U.S.C. § 702.

Nevertheless, in order to be reviewable, the decision to repatriate must constitute "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The refugees were forcefully repatriated despite inadequate screening procedures used by low ranking government officials. Therefore, INS took final action, and the Haitians had no other adequate remedy to compel INS officials to comply with the mandates of United States law. Thus, this agency action is subject to judicial review unless the relevant law precludes judicial review, or the action of the agency is committed to its discretion by law. *See* 5 U.S.C. § 701(a)(1) and (2).

2. Reviewability and Section 701(a)(1) Exceptions

Once the refugees established that they met the criteria set out in APA sections 702 and 704, a strong presumption of reviewability of agency action attached. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670, 106 S.Ct. 2133, 2135, 90 L.Ed.2d 623 (1986). In *Bowen*, the Court noted:

> Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

Bowen, 476 U.S. at 671, 106 S.Ct. at 2136 (citing S.Rep. No. 762, 79th Cong., 1st Sess. 26, (1945)). In the present case, the government is in effect asking

for a "blank check" drawn to the credit of the INS because the Haitian refugees have not reached the shores of the United States.

The actions of low ranking government officials charged with the duty of properly interviewing the refugees are subject to judicial review unless it is clear that such review is barred. *See Morris v. Gressette*, 432 U.S. 491, 500-01, 97 S.Ct. 2411, 2418, 53 L.Ed.2d 506 (1977); *Barlow v. Collins*, 397 U.S. 159, 165, 90 S.Ct. 832, 837, 25 L.Ed.2d 192 (1970); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967). Nothing in the Protocol or Executive Order 12324 with its implementing INS guidelines precludes judicial review. As noted earlier, I concluded in *Haitian Refugee Center v. Baker*, 949 F.2d at 1113-16 that the Protocol incorporating Article 33 is self-executing and applies extraterritorially. Article 33 provides:

> No contracting state shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion.

Convention Relating to the Status of Refugees, art. 33, ¶ 1, 198 U.N.T.S. 150, 176 (July 28, 1951). The Protocol defines "refugee" as any person who,

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

Protocol, art. 1, ¶ 2, 19 U.S.T. 6223, 6225; T.I.A.S. No. 6577 at 3. Nothing in the language of Article 33 or definitional sections of the Protocol precludes judicial review of the enforcement of the law's mandate.

Additionally, a district court does have jurisdiction to evaluate claims based on an executive order. *See Farkas*, 375 F.2d at 632. The Executive Order on which the refugees rely states:

> [N]o person who is a refugee will be returned without his consent. . . . The Attorney General shall, in consultation with the Secretary of State and the Secretary of the Department in which the Coast Guard is operating, take whatever steps are necessary to ensure the fair enforcement of our laws relating to immigration (including effective implementation of this Executive Order) and the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland.

Exec.Order No. 12324, 46 Fed.Reg. 48,109 (1981). Nevertheless, the majority rejects the refugees' claim based on the Executive Order, stating that the Executive Order does not give rise to a private cause of action. Apparently, the majority believes that since the Executive Order establishes an interdiction program that takes place on the high seas, "it could not have been the intention of the President to allow the interdictees to initiate judicial review of *their cases* in the district courts of the United States." Majority Op. at 1511 (emphasis added). At this point the majority's position must fail.

The refugees do not seek judicial review of the denial of asylum in their individual cases. The majority took note of this fact when it recognized

"[HRC's] claim . . . is not based on a challenge to any individual determination made by the INS officers. Rather, the plaintiffs challenge the procedure used to interview the interdictees in order to determine which ones are subject to being repatriated." Majority Op. at 1508. The refugees' assertion that low level executive officials are not following guidelines for the interviewing procedures enables them to pursue this cause of action.

This case is analogous to *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd* 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985). In *Jean*, we held that although courts have no authority to evaluate individual deportation orders, courts do have the authority to determine whether the actions of lower-level immigration officials were exercised in accordance with executive policy. We stated:

> [S]ince the discretion of lower-level immigration officials is circumscribed not only by legislative enactments but also by the instructions of their superiors in the executive branch, . . . [t]he district court must still determine whether the actions of lower-level officials in the field conform to the policy statements of their superiors in Washington.

Jean, 727 F.2d at 978. In this case, the refugees do not seek review of individual asylum determinations, but rather seek review of the procedures the lower-level officials employed. The refugees claim that these lower-level officials did not follow the guidelines promulgated pursuant to the Executive Order in processing them. They also allege that the officials acted arbitrarily and capriciously. Although the aliens in *Jean* were on United States soil and the Haitians in

this case were not, nothing in the language of the APA suggests that aliens cannot seek redress under the APA. Further, nothing in the language of the Protocol or the Executive Order precludes the refugees from asserting a cause of action based on the APA to set aside the acts of low ranking government officials.

The Supreme Court, however, has held that section 701(a)(1) of the APA can still apply to preclude judicial review even if the specific language of the law does not preclude such review. In *Bowen*, the Supreme Court stated that the presumption against reviewability can be overcome by "specific language or specific legislative history that is a reliable indicator of congressional intent, or a specific congressional intent to preclude judicial review that is 'fairly discernible' in the detail of the legislative scheme." *Bowen*, 476 U.S. at 673, 106 S.Ct. at 2137 (quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 349, 104 S.Ct. 2450, 2456, 81 L.Ed.2d 270 (1984)). The *Bowen* Court also recognized that

> the congressional intent necessary to overcome the presumption may also be inferred from contemporaneous judicial construction barring review and the congressional acquiescence in it . . . or from the collective import of legislative and judicial history behind a particular statute, . . . [or] by inferences of intent drawn from the statutory scheme as a whole.

Bowen, 476 U.S. at 673 n. 4, 106 S.Ct. at 2137 n. 4 (citations omitted). In this case, Presidential or Congressional intent to bar judicial review of the actions of low level government officials charged with the duty of properly interviewing refugees is not "fairly

discernable" in laws relating to the interdiction of Haitians. The legislative history surrounding the United States' accession to the Protocol does not indicate that Congress intended to bar judicial review of the enforcement of this law. Congress intended that the Protocol be self-executing and apply extraterritorially. *See Haitian Refugee Center v. Baker*, 949 F.2d 1109, 1113-14 (11th Cir.1991) (Hatchett, J., dissenting). *See also* Note, *Interdiction: The United States Continuing Violation of International Law*, 68 B.U.L.Rev. 773 (1988). Neither specific language nor reliable indicators rebut the presumption of reviewability. After examining as a whole the scheme of the United States's laws relating to the interdiction of Haitians on the high seas, I conclude that United States immigration law concerning interdiction does not preclude judicial review in this setting. Thus, section 701(a)(1) of the APA is inapplicable.

Additionally, the President specifically provided in his Executive Order that the United States's immigration laws would be enforced outside the territorial boundaries and waters of the United States. This exportation of laws also constitutes an exportation of rights and duties. These rights and duties are detailed in the Protocol and the Executive Order. Since the government has a duty to enforce these rights outside the borders of the United States, the corresponding enforcement mechanisms must accompany these rights. Thus, I cannot conclude that the President did not intend for the remedy provided by the APA to accompany the exportation and enforcement of United States immigration laws. This court must not adopt the unconscionable position of divorcing the remedy of APA review from the right to such review created by the Protocol and the Executive Order.

3. Reviewability and the Section 701(a)(2) Exception

The majority states that the refugees have no right to judicial review of the government's compliance with the INA through the APA. Specifically, the majority points to the language of the INA to determine that the interdicted Haitians have no cognizable rights. However, it is on the refugees' right to judicial review, through the APA, testing the government's compliance with the Protocol and the Executive Order upon which I find that the refugees have demonstrated a likelihood of success. Thus, the court must determine whether meaningful guidelines exist that provide a method to evaluate the actions of the lower-level INS officials. *See Heckler v. Chaney*, 470 U.S. 821, 830, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985) (the APA is applicable in "[*sic*] instances where statutes are "drawn so that a court would have [a] meaningful standard against which to judge the agency's exercise of discretion"). In the language of the APA, the inquiry is whether the officials' actions were "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). I find that they are not.

The majority concedes that "['e]ven when a decision is committed to agency discretion, a court may consider allegations that an agency failed to follow its own binding regulations.'" Majority Op. at 1508 (quoting *State of Florida, Dept. of Business Regulation v. United States Dept. of the Interior*, 768 F.2d 248, 1257 n. 11 (11th Cir.1985), *cert. denied*, 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986)). Further, in *CC Distributors, Inc. v. United States*, 883 F.2d 146, 154 (D.C.Cir.1989), the court held that administrative regulations promulgated to execute an agency's legal directives may serve as standards for

judicial review. *See also Center for Auto Safety v. Dole*, 846 F.2d 1532 (D.C.Cir.1988). The majority, however, finds that the language of the Protocol and the Executive Order neither limits lower-level INS agents' discretion nor enumerates specific criteria to be weighed when deciding who is a "refugee."[6]

What the majority fails to recognize is that the INS Guidelines serve as the standard for judicial review for both the Protocol and the Executive Order. The INS guidelines state that the "authority" upon which the guidelines are based includes "Article 33, United Nations Convention and Protocol Relating to the Status of Refugees" and "Executive Order No. 12324 dated September 29, 1981 (interdiction of Illegal Aliens)." The INS Guidelines for Interdiction at Sea were promulgated as a direct result of the Protocol and the Executive Order. The majority noted, "The Executive Order was issued specifically to establish a procedure for interdiction of Haitian migrants on the high seas." Majority Op. at 1510. The majority, however, found that the INS Guidelines did not provide meaningful standards for judicial review. Thus, the majority held that lower-level INS, officials' actions were committed to agency discretion by law. This conclusion is erroneous. In part, the INS guidelines state:

INS OFFICER RESPONSIBILITIES

A. To the extent that it is, within the opinion of the Commanding Officer of the United States

[6] In this instance, "refugee" is used as a legal term of art indicating interdictees who have undergone the appropriate screening procedures set forth in the INS guidelines. On other occasions, I have used the term "refugee" in its broad and non-legal sense.

Coast Guard vessel, safe and practicable, each person aboard an interdicted vessel shall be spoken to by an INS officer, through an interpreter. A log record shall be maintained of each such person, based on their responses to the following inquiries:

1. Name;
2. Date of Birth;
3. Nationality;
4. Home Town (obtain sufficient information to enable a later location of the individual to check on possible persecution);
5. All Documents or Evidence Presented;
6. Why did you leave Haiti;
7. Why do you wish to go to the United States;
8. Is there any reason why you cannot return to Haiti?

B. A copy of the log prepared by the INS officers shall be provided to the Commanding Officer of the Coast Guard vessel.

C. INS officers shall be constantly watchful for any indication (including bare claims) that a person or persons on board the interdicted vessel may qualify as refugees under the United Nations Convention and Protocol.

D. If there is any indication of possible qualification for refugee status by a person or persons on board an interdicted vessel, INS officers shall conduct individual interviews regarding such possible qualification.

E. Interviews regarding possible refugee status shall be conducted out of the hearing of other persons.

F. If necessary, INS officers will consult with Department of State officials, either on board, or via radio communications.

G. Individual records shall be made of all interviews regarding possible qualification for refugee status.

H. If the interview suggests that a legitimate claim to refugee status exists, the person involved shall be removed from the interdicted vessel, and his or her passage to the United States shall be arranged.

I. Individual record folders shall be prepared and maintained by INS officers in every case where a person is being sent on to the United States, and such record folder may be used to support such person's claim in the United States. (The individual folder shall contain a sworn statement by the applicants concerning the claim).

The guidelines specifically detail information that INS officials are to obtain from each Haitian claiming refugee status. The guidelines do not use permissive language to describe how INS officials are to treat Haitians who make even bare claims that they qualify as refugees under the Protocol. Instead, the guidelines employ mandatory language such as "INS officers *shall* conduct individual interviews"; "Interviews . . . *will* be conducted out of the hearing of other persons"; "Individual records *shall* be made"; "If the interview suggests that a legitimate claim to refugee status exists, the person in-

volved *shall be removed* from the interdicted vessel, and his or her passage to the United States *shall* be arranged." INS Guidelines §§ C, D, E, G, and H. These guidelines state standards that are to be adhered to when processing interdicted Haitians. The government's failure to follow these guidelines, as found by the district court, means that the refugees have demonstrated a substantial likelihood of success on the APA claim.

C. CONCLUSION

HRC and the class of Haitians interdicted on the high seas can avail themselves of judicial review because: (1) they satisfy the standard set out in 5 U.S.C. § 702; (2) the government officials' actions are reviewable under 5 U.S.C. § 704; and (3) the government officials' actions do not come under the exclusion provisions of 5 U.S.C. § 701(a). Thus, the APA provides HRC with a cause of action to seek judicial review of the actions of low ranking government officials charged with the duty of properly screening Haitian interdictees.

APPENDIX I

TREATY, STATUTORY PROVISIONS, AND EXECUTIVE ORDERS INVOLVED

---

1. Article 33 of the United Nations Convention Relating to the Status of Refugees provides:

> *Article 33.—Prohibition of expulsion or return ("refoulement")*
>
> 1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

2. The Administrative Procedure Act, 5 U.S.C. § 701(a), provides:

> **§ 701. Application; definitions**
>
> (a) This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

3. Section 243 of the Immigration and Nationality Act, as amended by Pub. L. No. 101-649, §§ 515 (a)(2), 606 (b)(3), 104 Stat. 5053, 5085, and codified at 8 U.S.C. 1253, provides:

> **§ 1253. Countries to which aliens shall be deported**
>
> **(a) Acceptance by designated country; deportation upon nonacceptance by country.** The deportation of an alien in the United States provided for in this Act, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

> (1) to the country from which such alien last entered the United States;
>
> (2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;
>
> (3) to the country in which he was born;
>
> (4) to the country in which the place of his birth is situated at the time he is ordered deported;
>
> (5) to any country in which he resided prior to entering the country from which he entered the United States;
>
> (6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or
>
> (7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

(b) Deportation during war. If the United States is at war and the deportation, in accordance with the provisions of subsection (a), of any alien who is deportable under any law of the United States shall be found by the Attorney General to be impracticable, inadvisable, inconvenient, or impossible because of enemy occupation of the country from which such alien came or wherein is located the foreign port at which he embarked for the United States or because of reasons connected with the war, such alien may, in the discretion of the Attorney General, be deported as follows:

(1) if such alien is a citizen or subject of a country whose recognized government is in exile, to the country in which is located that government in exile if that country will permit him to enter its territory; or

(2) if such alien is a citizen or subject of a country whose recognized government is not in exile, then to a country or any political or territorial subdivision thereof which is proximate to the country of which the alien is a citizen or subject, or, with the consent of the country of which the alien is a citizen or subject, to any other country.

(c) Payment of deportation costs; within five years. If deportation proceedings are instituted at any time within five years after the entry of the alien for causes existing prior to or at the time of entry, the cost of removal to the port of deportation shall be at the expense of the appropriation for the enforcement of this Act, and the deportation from such port shall be at the ex-

pense of the owner or owners of the vessels, aircraft, or other transportation lines by which such alien came to the United States, or if in the opinion of the Attorney General that is not practicable, at the expense of the appropriation for the enforcement of this Act: Provided, That the costs of the deportation of any such alien from such port shall not be assessed against the owner or owners of the vessels, aircraft, or other transportation lines in the case of any alien who arrived in possession of a valid unexpired immigrant visa and who was inspected and admitted to the United States for permanent residence. In the case of an alien crewman, if deportation proceedings are instituted at any time within five years after the granting of the last conditional permit to land temporarily under the provisions of section 252 [8 USCS § 1282], the cost of removal to the port of deportation shall be at the expense of the appropriation for the enforcement of this Act and the deportation from such port shall be at the expense of the owner or owners of the vessels or aircraft by which such alien came to the United States, or if in the opinion of the Attorney General that is not practicable, at the expense of the appropriation for the enforcement of this Act.

(d) Cost of deportation, subsequent to five years. If deportation proceedings are instituted later than five years after the entry of the alien, or in the case of an alien crewman later than five years after the granting of the last conditional permit to land temporarily, the cost thereof shall be payable from the appropriation for the enforcement of this Act.

(e) Refusal to transport or to pay. A failure or refusal on the part of the master, commanding officer, agent, owner, charterer, or consignee of a vessel, aircraft, or other transportation line to comply with the order of the Attorney General to take on board, guard safely, and transport to the destination specified any alien ordered to be deported under the provisions of this Act, or a failure or refusal by any such person to comply with an order of the Attorney General to pay deportation expenses in accordance with the requirements of this section, shall be punished by the imposition of a penalty in the sum and manner prescribed in section 237(b) [8 USCS § 1227(b)].

(f) Payment of expenses of physically incapable deportees. When in the opinion of the Attorney General the mental or physical condition of an alien being deported is such as to require personal care and attendance, the Attorney General shall, when necessary, employ a suitable person for that purpose who shall accompany such alien to his final destination, and the expense incident to such service shall be defrayed in the same manner as the expense of deporting the accompanied alien is defrayed, and any failure or refusal to defray such expenses shall be punished in the manner prescribed by subsection (e) of this section.

(g) Countries delaying acceptance of deportees. Upon the notification by the Attorney General that any country upon request denies or unduly delays acceptance of the return of any alien who is a national, citizen, subject, or resident thereof, the Secretary of State shall instruct consular officers performing their duties in the territory of such country to discontinue the issuance of immigrant visas to nationals, citizens, subjects, or residents of such country, until such time as the Attorney General shall inform the Secretary of State that such country has accepted such alien.

(h) Withholding of deportation or return. (1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(d)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion. (2) Paragraph (1) shall not apply to any alien if the Attorney General determines that—

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

For purposes of subparagraph (B), an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime.

4. EXECUTIVE ORDER No. 12807 provides:

INTERDICTION OF ILLEGAL ALIENS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a)(1) of the Immigration and Nationality Act, as amended (8 U.S.C. 1182(f) and 1185 (a)(1)), and whereas:

(1) The President has authority to suspend the entry of aliens coming by sea to the United States without necessary documentation, to establish reasonable rules and regulations regarding, and other limitations on, the entry or attempted entry of aliens into the United States, and to repatriate aliens interdicted beyond the territorial sea of the United States;

(2) The international legal obligations of the United States under the United Nations Protocol Relating to the status of Refugees (U.S. T.I.A.S. 6577; 19 U.S.T. 6233) to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States;

(3) Proclamation No. 4865 suspends the entry of all undocumented aliens into the United States by the high seas; and

(4) There continues to be a serious problem of persons attempting to come to the United States

by sea without necessary documentation and otherwise illegally;

I, GEORGE BUSH, President of the United States of America, hereby order as follows:

Section 1. The secretary of State shall undertake to enter into, on behalf of the United States, cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea.

Sec. 2. (a) The Secretary of the Department in which the Coast Guard is operating, in consultation, where appropriate, with the Secretary of Defense, the Attorney General, and the Secretary of State, shall issue appropriate instructions to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens by sea and the interdiction of any defined vessel carrying such aliens.

(b) Those instructions shall apply to any of the following defined vessels:

(1) Vessels of the United States, meaning any vessel documented or numbered pursuant to the laws of the United States, or owned in whole or in part by the United States, a citizen of the United States, or a corporation incorporated under the laws of the United States or any State, Territory, District, Commonwealth, or possession thereof, unless the vessel has been granted nationality by a foreign nation in accord with Article 5 of the Convention on the High Seas of 1958 (U.S. T.I.A.S. 5300; 13 U.S.T. 2312).

(2) Vessels without nationality or vessels assimilated to vessels without nationality in accordance with paragraph (2) of Article 6 of the

Convention on the High Seas of 1958 (U.S. T.I.A.S. 5200; 13 U.S.T. 2312).

(3) Vessels of foreign nations with whom we have arangements authorizing the United States to stop and board such vessels.

(c) Those instructions to the Coast Guard shall include appropriate directives providing for the Coast Guard:

(1) To stop and board defined vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons or violations of United States law or the law of a country with which the United States has an arrangement authorizing such action.

(2) To make inquiries of those on board, examine documents and take such actions as are necessary to carry out this order.

(3) To return the vessel and its passengers to the country from which it came, or to another country, when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist; provided, however, that the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent.

(d) These actions, pursuant to this section, are authorized to be undertaken only beyond the territorial sea of the United States.

Sec. 3. This order is intended only to improve the internal management of the Executive Branch. Neither this order nor any agency guidelines, procedures, instructions, directives, rules or regulations implementing this order shall create, or shall be construed to create, any right

or benefit, substantive or procedural (including without limitation any right or benefit under the Administrative Procedure Act), legally enforceable by any party against the United States, its agencies or instrumentalities, officers, employees, or any other person. Nor shall this order be construed to require any procedures to determine whether a person is a refugee.

Sec. 4. Executive Order No. 12324 is hereby revoked and replaced by this order.

Sec. 5. This order shall be effective immediately.

/s/ George Bush

THE WHITE HOUSE.
May 23, 1992.

5. Executive Order 12324 of September 29, 1981, provides:

Interdiction of Illegal Aliens

By the authority vested in me as President by the Constitution and statutes of the United States of America, including Sections 212(f) and 215 (a) (1) of the Immigration and Nationality Act, as amended (8 U.S.C. 1182(f) and 1185(a) (1)), in view of the continuing problem of migrants coming to the United States, by sea, without necessary entry documents, and in order to carry out the suspension and interdiction of such entry which have concurrently been proclaimed, it is hereby ordered as follows:

Section 1. The Secretary of State shall undertake to enter into, on behalf of the United States, cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea.

Sec. 2. (a) The Secretary of the Department in which the Coast Guard is operating shall issue appropriate instructions to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens and the interdiction of any defined vessel carrying such aliens.

(b) Those instructions shall apply to any of the following defined vessels:

(1) Vessels of the United States, meaning any vessel documented under the laws of the United States, or numbered as provided by the Federal Boat Safety Act of 1971, as amended (46 U.S.C. 1451 *et seq.*), or owned in whole or in part by the United States, a citizen of the United States, or a corporation incorporated under the laws of the United States of any State, Territory, District, Commonwealth, or possession thereof, unless the vessel has been granted nationality by a foreign nation in accord with Article 5 of the Convention on the High Seas of 1958 (U.S. TIAS 5200; 13 UST 2312).

(2) Vessels without nationality or vessels assimilated to vessels without nationality in accordance with paragraph (2) of Article 6 of the Convention on the High Seas of 1958 (U.S. TIAS 5200; 13 UST 2312).

(3) Vessels of foreign nations with whom we have arrangements authorizing the United States to stop and board such vessels.

(c) Those instructions to the Coast Guard shall include appropriate directives providing for the Coast Guard:

(1) To stop and board defined vessels, when there is reason to believe that such vessels are

engaged in the irregular transportation of persons or violations of United States law or the law of a country with which the United States has an arrangement authorizing such action.

(2) To make inquiries of those on board, examine documents and take such actions as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel.

(3) To return the vessel and its passengers to the country from which it came, when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist: provided, however, that no person who is a refugee will be returned without his consent.

(d) These actions, pursuant to this Section, are authorized to be undertaken only outside the territorial waters of the United States.

Sec. 3. The Attorney General shall, in consultation with the Secretary of State and the Secretary of the Department in which the Coast Guard is operating, take whatever steps are necessary to ensure the fair enforcement of our laws relating to immigration (including effective implementation of this Executive Order) and the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland.

/s/ Ronald Reagan

THE WHITE HOUSE.
September 29, 1981.

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No. 92-344

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GENE McNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the laws of the United States, including Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h), bar executive officials from summarily returning Haitian aliens to Haiti where their life or freedom would be threatened on account of political opinion.

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No. 92-344

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GENE McNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, *ET AL.*,

Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., *ET AL.*,

Respondents.

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents Haitian Centers Council, Inc., *et al.* oppose the petition for a writ of certiorari because the decision below is correct and warrants no further review. Should the Court wish to grant the writ, however, it should limit its review to the only issue on which the circuits are divided, namely, whether the laws of the United States, including Section 243(h) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1253(h), bar executive officials from summarily returning Haitian aliens to Haiti, where their life or freedom would be threatened on account of political opinion.

STATEMENT

Before 1980, § 243(h)(1) of the Immigration and Nationality Act ("INA") "authorized" the Attorney General "to withhold deportation of any alien *within the United States* to any country in which in his opinion the alien would be subject to persecution on account of . . . political opinion" (emphasis added). To conform with our binding treaty obligations under Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, Petitioners' Appendix (Pet. App.) at 253a ("Refugee Convention"), Congress amended that provision in 1980 to mandate that "[t]he Attorney General *shall not* deport or *return any alien* . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of . . . political opinion" 8 U.S.C. § 1253(h)(1) (emphasis added). Despite that unambiguous directive, on May 24, 1992, petitioners began summarily and forcibly returning all interdicted Haitian aliens to Haiti, including *bona fide* refugees whose life or freedom would undeniably be threatened on account of political opinion.

No government in the Western world has ever before taken to the high seas to intercept fleeing refugees and to return them, forcibly and without process, to their persecutors.[1] Petitioners' policy has encircled the people of Haiti with a "Floating Berlin Wall," which bars refugees from escaping persecution and death. Moreover, the policy renders the U.S. Coast Guard agents of a murderous dictatorship in Haiti that the Executive Branch has itself condemned as illegitimate.

In a careful and well-reasoned decision, the Second Circuit held that petitioners' unprecedented policy violates the plain language of § 243(h)(1). That decision is correct and should be

1. To the contrary, United States officials have continued to condemn "in principle and in practice" the British policy of forcibly and involuntarily repatriating Vietnamese boat people fleeing to Hong Kong. *N.Y. Times*, Jan. 25, 1990, at A6.

left undisturbed. The Second Circuit's decision merely enforces the unambiguous language and intent of both § 243(h) and the self-executing treaty provision that it reinforces, Article 33 of the Refugee Convention. Pet. App. at 15a-35a. The majority opinion's sound reasoning on this point fully exposed the error of the Eleventh Circuit's shallow and conclusory ruling in *Haitian Refugee Center, Inc. v. Baker* (*HRC v. Baker*), 953 F.2d 1498 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992), Pet. App. at 214a-216a, a case that involved different parties and circumstances than those presented here. *See infra*, pp. 15-19.

The Solicitor General now asks this Court, sitting as a court of error, to review all aspects of the Second Circuit's opinion. Should this Court wish to grant review, it should limit certiorari to the specific question that divides the circuits: whether the laws of the United States, including § 243(h), bar executive officials from summarily returning Haitian aliens to Haiti, where their life or freedom would be threatened on account of political opinion. By broadly wording the question presented, however, the Solicitor General asks this Court to review not only that issue but also three collateral questions, which fail the standards for certiorari review in Supreme Court Rule 10. Petition for Certiorari ("Pet.") at 12 (Issues No. 1, 2, and 4). Respondents oppose certiorari on these extraneous questions, which are fact-specific, not fully litigated below, or issues over which no genuine circuit split exists. This Court should not divert time and resources away from the core issue disputed here to adjudicate collateral questions of little national importance or to correct alleged errors in a particular case.

I. Background

In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 11, 1967, 19 U.S.T. 6223, T.I.A.S. 6577 (entered into force Oct. 4, 1967), thereby accepting as domestic law the 1951 Refugee Convention. Article 33 of the Refugee Convention mandates, categorically and without geographic limitation, that "[n]o Contracting State shall expel *or return* ("*refouler*") a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be

threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" (emphasis added). In the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 107 (1980), Congress amended § 243(h) of the INA to conform to Article 33, deleting the preexisting limiting language "within the United States" and specifying that "[t]he Attorney General *shall not* deport or *return any alien*...to a country if the Attorney General determines that such alien's life or freedom would be threatened." 8 U.S.C. § 1253(h) (emphasis added).

The following year, the United States began interdicting, screening, and returning Haitians from vessels in international waters, pursuant to a bilateral executive agreement signed with the Haitian government, Agreement Effected By Exchange of Notes, signed at Port-au-Prince, September 23, 1981, T.I.A.S. No. 10,241 ("U.S.-Haiti Agreement"). That agreement authorized the United States to return "detained vessels and persons to a Haitian port," but expressly acknowledged that even on the high seas the United States was bound by "*international obligations mandated in the Protocol* Relating to the Status of Refugees" (emphasis added).[2] Evaluating the legality of this proposed program, the Justice Department's own legal counsel concluded that, even on the high seas, Article 33 obliged the United States to ensure that interdicted Haitians "who claim that they will be persecuted . . . must be given an opportunity to substantiate their claims." *Proposed Interdiction of Haitian Flag Vessels*, 5 Op. Off. Legal Counsel 242, 248 (1981) ("OLC Opinion") (emphasis added).[3]

2. "Under these arrangements," the accord declared, "*the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status*" (emphasis added).

3. Ten years later, in a letter entitled "Re. *Haitian Refugee Center, Inc. v. Baker*" and written one month after that lawsuit was filed, the Legal Adviser of the State Department successfully prevailed upon the Office of Legal Counsel (OLC) to withdraw this conclusion, although the text of neither Section 243(h) nor Article 33 had changed in the interim. *See* Pet. App. at 30a-31a. The court below characterized OLC's revised (continued...)

Accordingly, Executive Order No. 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1981), *reprinted in* 8 U.S.C. § 1182 (1988), issued shortly thereafter, directed that with respect to aliens interdicted in international waters, the

> Attorney General shall...take whatever steps are necessary to ensure the fair enforcement of our laws relating to immigration...and the *strict observance of our international obligations concerning those who genuinely flee persecution in their homeland.*

Section 3 (emphasis added).

Thus, Article 33 of the U.N. Protocol, § 243(h) of the Refugee Act, and the U.S.-Haiti agreement all bound petitioners not to return Haitians interdicted on the high seas to conditions of persecution without first making individualized determinations regarding the credibility of their asylum claims. Pursuant to these legal mandates, for more than ten years petitioners pursued an interdiction program of "preliminary screening before return." Pet. App. at 10a.[4]

II. *HRC v. Baker*

In November 1991, Haitians began fleeing in record numbers following the September 30, 1991 military coup that overthrew the government of President Jean-Bertrand Aristide. Petitioners continued their policy of "screening out" and returning to Haiti interdicted Haitians who lacked credible fears of persecution, but began holding "screened-in" Haitians at the

3.(...continued)
interpretation as "'the sort of *post hoc* litigation posture that is entitled to no deference'" and thus not "the sort of 'extraordinarily strong contrary evidence' needed to nullify the plain langague of Article 33.1." *Id.* at 31a (citations omitted).

4. *See* Pet. at 3 ("Any interdictees who made a credible showing of political refugee status were tentatively 'screened in' *and brought to the United States*, where they could file a formal application for political asylum . . . . Interdictees unable to make such a showing were 'screened out' and returned immediately to Haiti.").

United States Naval Base at Guantanamo Bay, Cuba. In November 1991, Haitian Refugee Center (HRC) brought a suit in the United States District Court for the Southern District of Florida, for itself and a class represented by fourteen named plaintiffs who had been "screened-out," challenging the adequacy of the initial screening procedures. *HRC v. Baker*, Second Amended Complaint at paras. 3, 9-24. The District Court issued several injunctions against petitioners' conduct, which the Eleventh Circuit reversed in two separate rulings. Pet. App. at 171a, 190a.

In opposing certiorari in *Baker*, the Solicitor General specifically represented to this Court that

> Under current practice [followed for more than a decade], any [screened-in] aliens who satisfy the threshold standard *are to be brought to the United States* so that they can file an application for asylum under Section 208 (a) of the [INA] . . . . These 'screened in' individuals then have the opportunity for a *full adjudicatory determination* of whether they satisfy the statutory standard of being a 'refugee' and otherwise qualify for the discretionary relief of asylum.

Solicitor General's Opposition to Petition for Certiorari in *HRC v. Baker* at 3 (emphasis added). Yet only five days after this Court denied *certiorari* in *Baker*, petitioners broke that promise, began reinterviewing "screened-in" Haitians *on Guantanamo* without lawyers, and repatriated many of these "screened-in" Haitians to Haiti.

III. *HCC v. McNary I*

Respondents then brought this action in the Eastern District of New York on behalf, *inter alia*, of the "screened-in" Haitians on Guantanamo, challenging petitioners' new policy and seeking an order that no screened-in Haitian on Guantanamo could be reinterviewed or repatriated without counsel. The United States District Court for the Eastern District of New York (Johnson, J.) issued a temporary restraining order ("TRO") and a preliminary injunction against petitioners' practices, and the Second Circuit

affirmed with modifications, directing the district court to "immediately take steps to expedite the trial process." Pet. App. at 117a.[5] In accordance with the Second Circuit's mandate, the District Court has ordered a pretrial conference on September 22, 1992, with trial likely to commence in October.

IV. *HCC v. McNary II*

On May 24, 1992, pursuant to a new order issued by the President from his Kennebunkport, Maine home, petitioners simply dispensed with their legal obligations not to return aliens to a country where such aliens' life or freedom would be threatened. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992), Pet. App. at 260a ("Kennebunkport Order").[6] Instead, petitioners Coast Guard and Immigration and Naturalization Service ("INS") instituted a new interdiction program of "summary return without screening," Pet. App. at 10a, forcibly returning *all* Haitians, including *bona fide* refugees, without any process or questioning, to conditions of persecution and death in Haiti.[7]

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5. The Solicitor General did not move in this Court to stay the Second Circuit's order, and the Second Circuit denied the Government's petition for rehearing and its suggestion of rehearing en banc on July 24, 1992.

6. Although petitioners now claim that the Kennebunkport Order was triggered by foreign policy exigencies, Section 3 of that Order, obviously seeking to fend off judicial review, clearly states: "This order is intended *only* to improve the internal management of the Executive Branch." Pet. App. at 262a (emphasis added).

7. *See* Pet. App. at 13a ("[T]he Kennebunkport Order . . . made no pretense at all of adhering to the Solicitor General's prior representation to the Supreme Court. On the contrary, it permitted a policy, subsequently implemented, of *no* screening whatsoever.")(emphasis in original). Petitioners claim that "Coast Guard instructions" permit commanding officers of Coast Guard vessels to grant temporary refuge to interdictees "in immediate and exceptionally grave physical danger, based on either the officer's observation or compelling statements by the individual." Pet. at 8 n.5. But respondents know of no instance when this exception has been invoked. Moreover, it is fanciful to believe that Coast Guard commanders have either the time, the expertise, or the training necessary to conduct asylum interviews.

Just days before this new interdiction program began, more than 30 percent of all Haitians interdicted were being screened in to the United States by INS asylum officers as having credible fears of persecution in Haiti. *See* P.E. 88, Deposition of Scott Busby at 34. But with the stroke of a pen, petitioners declared their indifference to the fears of interdicted Haitians, even as political violence in Haiti spiraled to unprecedented levels. Moreover, notwithstanding § 243(h), § 2(c)(3) of the Kennebunkport Order purported to give petitioner Attorney General "unreviewable discretion" to return to Haiti all Haitians interdicted after May 24 without regard to their fears of political persecution.[8]

Pursuant to this new interdiction program, petitioners have forcibly repatriated more than 3,000 Haitians without any procedures and regardless of their fear of political persecution.[9] On May 28, 1992, plaintiffs moved in the District Court for a TRO challenging petitioners' new policy as *ultra vires* and violative, *inter alia*, of § 243(h) of the INA and Article 33 of the Refugee Convention. The District Court denied relief, but

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8. *See* Kennebunkport Order, Sec. 2(c)(3) ("the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent.")

9. In lieu of asylum processing in either Miami or Guantanamo, petitioners offered to process refugee claims at the U.S. Embassy and Consulate in Port-au-Prince under Section 207 of the INA, 8 U.S.C. § 1157, and claim that more than 9,000 applicants have sought refugee status through this route. Pet. at 9, n.6; 30 n.17. But the availability of one form of refuge under the INA—section 207 embassy processing—does not justify petitioners' unilateral elimination for Haitians of two other forms of statutory relief: Section 243(h) protection against involuntary return and Section 208 asylum relief, 8 U.S.C. § 1158. Moreover, the accuracy of this process is highly suspect. Of the nearly 9,000 refugee processing applicants, respondents are aware of fewer than 100 who have actually received refugee status (about 1%) even though in May, INS officials were screening in roughly 30% of all interdicted Haitians as having credible fears of political persecution. In any event, the illegality of summarily returning refugees cannot be cured simply by subsequently allowing them to wait in line in their country of persecution, under dangerous conditions, to apply for asylum that is effectively unavailable through this means.

condemned the change in U.S. policy in the harshest possible terms, holding that "[p]laintiffs undeniably make a substantial showing of irreparable harm . . . ." *Id.* at 166a.[10]

On expedited appeal, the Second Circuit reversed and remanded with instructions to enter the injunction. Writing for himself and Judge Newman over Judge Walker's dissent, Judge Pratt denied that plaintiffs were precluded by the Eleventh Circuit's prior ruling regarding § 243(h) in *HRC v. Baker* because that case involved different parties and different circumstances. *Id.* at 7a-14a. On the merits, the majority concluded that "the executive's action of reaching out into international waters, intercepting Haitian refugees, and returning them without determining whether the return is to their persecutors" constitutes the "return" of "any alien" forbidden by the plain language of § 243(h). Pet. App. at 23a. Moreover, the majority found that the extraterritorial scope of § 243(h) conforms to both the plain language and the purpose of Article 33 of the Refugee Convention in applying to "all aliens, no matter where found." *Id.* at 35a. The majority held that the case was judicially reviewable. *Id.* at 38a. Finally, the Court concluded that neither statutory provisions empowering the President to regulate entry nor the President's constitutional powers as commander-in-chief and the "sole organ" of the nation in its external affairs authorized executive officials to summarily return Haitians to their

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10. The District Court wrote:

> It is unconscionable that the United States should accede to the Protocol and later claim that it is not bound by it. This court is astonished that the United States would return Haitian refugees to the jaws of political persecution, terror, death and uncertainty when it has contracted not to do so. The Government's conduct is particularly hypocritical given its condemnation of other countries who have refused to abide by the principle of non-refoulement. As it stands now, Article 33 is a cruel hoax and not worth the paper it is printed on unless Congress enacts legislation implementing its provisions . . . .

Pet. App. at 167a (footnote omitted).

persecutors, a policy that Congress had explicitly forbidden by enacting § 243(h) pursuant to its plenary immigration power. *Id.* at 35a-38a.

In accordance with the Second Circuit's decision, the District Court entered a preliminary injunction prohibiting petitioners from returning to Haiti any interdicted Haitian whose life or freedom would be threatened on account of political opinion. Pet. App. at 170a. On August 1, 1992, this Court stayed the lower courts' rulings pending the expedited filing and disposition of the Solicitor General's petition for certiorari.

ARGUMENT

The writ should be denied because the decision below is correct and warrants no further review. The Solicitor General concedes that the Second Circuit decided only one issue that is in "direct conflict" with the Eleventh Circuit, namely, whether § 243(h) applies outside the territorial borders of the United States. Pet. at 12. Should the Court wish to resolve this conflict, it should grant plenary review only of this narrow issue and the alternative grounds for affirmance raised below.[11] The only question properly presented to this Court is whether the laws of the United States, including § 243(h), bar executive officials from summarily returning Haitian aliens to Haiti, where their life or freedom would be threatened on account of political opinion. The other three issues enumerated by the Solicitor General, Pet. at 12—regarding availability of judicial review, collateral estoppel, and equitable principles—fail the standards of Supreme Court

11. By holding that Section 243(h) of the INA applied extra-territorially to bar petitioners' policy, the Second Circuit did not reach or decide the questions whether the Kennebunkport Order should also be invalidated under Article 33 of the Refugee Convention, the U.S.-Haiti Agreement, or on equal protection grounds. This Court has repeatedly held that respondents are "entitled under our precedents to urge any grounds which would lend support to the judgment below," *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977); *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982).

Rule 10 and do not warrant this Court's review. These are collateral issues that either were not fully litigated below, were not addressed by the Second Circuit, as to which no circuit split exists, or are fact-specific questions lacking significance outside this case.

I. Availability of Judicial Review

Petitioners first seek review on the ground that judicial review is "impliedly precluded" under the Administrative Procedure Act (APA), leaving respondents with "no basis for invoking the jurisdiction of the U.S. courts to seek the extraordinary relief the courts below ordered." Pet. at 13. Yet as petitioners recognize, their novel claim was neither addressed by the Second Circuit, Pet. at 12, nor dispositive of the Eleventh Circuit's decision in *HRC v. Baker*, Pet. at 13 n.7; Pet. App. at 204a, 214a (Eleventh Circuit decided the merits of plaintiffs' § 243(h) claim despite its determination that judicial review under the APA was precluded). Both the Second and Eleventh Circuits reviewed the executive branch's actions on the merits *without regard to the availability of judicial review under the APA*. Hence, this issue does not genuinely divide the circuits, and does not merit this Court's review.[12] Even if this Court were to reverse the Second Circuit on this ground, its judgment would remain unaffected, for that court, like the Eleventh Circuit in *Baker*, could still decide the merits of plaintiffs' § 243(h) claim despite this Court's determination that judicial review under the APA was precluded.

12. To contrive a circuit conflict on this issue, petitioners posit that "[t]he only plausible basis for judicial review would be the cause of action established by the [APA]." Pet. at 13. Yet the Second Circuit's decision contains no holding or analysis of any kind about the APA or the availability of judicial review under it. Nor did the Eleventh Circuit in *Baker* accept petitioners' analysis of the APA. By rejecting plaintiffs' § 243(h) claim "on the merits" after denying judicial review under the APA, the Eleventh Circuit effectively recognized that the plaintiffs had a cause of action *independent* of the APA. Pet. at 13 n.7.

More fundamentally, petitioners' patently false claim that the INA "impliedly precludes" judicial review under § 701(a) of the APA, 5 U.S.C. § 701(a)(1), conflicts with prior decisions of this Court. This Court long ago settled that § 702 of the APA creates a presumption of judicial review of final agency action. *See, e.g., Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) ("[w]e begin with the strong presumption that Congress intends judicial review of administrative action."). This Court has also recognized that the presumption of reviewability does not evaporate in immigration cases. *See, e.g., McNary v. Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991); *Jean v. Nelson*, 472 U.S. 846 (1985); *Marcello v. Bonds*, 359 U.S. 302 (1955). Lower courts have regularly acknowledged the judicial reviewability of general policies, practices or procedures affecting the rights of aliens, including their right to apply for asylum.[13]

Petitioners ignore this precedent, now claiming that the INA "impliedly" precludes judicial review under 5 U.S.C. § 701(a)(1) by "prescrib[ing] detailed procedures for administrative and judicial review for aliens who claim to be refugees when they seek asylum or withholding of deportation" from within the United States, but no such procedures for refugees who apply from abroad. Pet. at 13. Yet the APA provides that a subsequently enacted "statute may not be held to supersede or modify . . . chapter 7 [providing for judicial review] . . . except to the extent that it does so expressly." 8 U.S.C. § 559. In *Marcello v. Bonds*, 359 U.S. 302 (1955), this Court settled that the APA will be held inapplicable only when Congress expressly so provides.

Petitioners can point to no provision expressly limiting judicial review here. The only remotely relevant INA provision they cite, 8 U.S.C. § 1105a(a), applies only to "judicial review of all *final orders of deportation*" and exclusion, *id.*, not to

13. *See, e.g., Montes v. Thornburgh*, 919 F.2d 531 (9th Cir. 1990); *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982); *Morales v. Yuetter*, 952 F.2d 954 (7th Cir. 1991). *See generally Jean v. Nelson*, 472 U.S. 846 (1985).

governmental conduct towards aliens that arises wholly outside the deportation or exclusion process.[14] By its terms and as consistently applied by this Court, as recently as last year in *McNary*, § 1105a does not bar judicial review of claims such as those here, which are wholly unrelated to deportation or exclusion proceedings and which challenge the policy of forcible return without agency procedures, not the review of *individual* case adjudications.[15] Notwithstanding petitioners' claims, courts routinely review a wide range of immigration decisions and practices that occur outside deportation proceedings and for which no specialized INA statutory review provisions exist.[16]

14. Petitioners cite three other provisions, 8 U.S.C. §§ 1157, 1158 and 1253, that establish the substantive rules governing refugee admissions, asylum processing and withholding of deportation, but say nothing at all about judicial review. Pet. at 13.

15. *See, e.g., Cheng Fan Kwok v. INS*, 392 U.S. 206, 215 (1968) ("[W]e believe that . . . Congress quite deliberately restricted the application of § 106(a) [§ 1105a(a)] to orders entered during proceedings conducted under § 242(b), or directly challenging deportation orders themselves") (Harlan, J.); *INS v. Chadha*, 462 U.S. 919, 937-39 (1983) (§ 1105a governs review of matters "on which *the final order* is contingent") (emphasis added). *See generally* T.A. Aleinikoff & D. Martin, *Immigration Process and Policy*, 854-62 (2d ed. 1991). Moreover, the provisions of § 1105a apply only to the review of *individual* case adjudications, and not to challenges to the *procedures* used in making such determinations. *See McNary v. Haitian Refugee Center*, 111 S. Ct. 888 (1991); *Jean v. Nelson*, 472 U.S. 846 (1985).

16. *See, e.g., ILWU v. Meese*, 891 F.2d 1374 (9th Cir. 1989) (judicial review available for decision regarding definition of aliens independent of § 1105a); *Pancho Villa Restaurant v. U.S. Dep't of Labor*, 796 F.2d 596 (2d Cir. 1986) (judicial review available for denial of alien labor certification independent of § 1105a); *Dina v. Attorney General*, 793 F.2d 473 (2d Cir. 1986) (judicial review available for denial of waiver to return to native country before citizenship application independent of § 1105a); *Parcham v. INS*, 769 F.2d 1001 (4th Cir. 1985) (judicial review available for denial of voluntary departure independent of § 1105a); *Shoreham Cooperative Apple Producers Ass'n v. Donovan*, 764 F.2d 135 (2d Cir. 1985) (judicial review of Department of Labor methodology for determining wages of non-immigrant aliens available despite § 1105a); *International Union of Bricklayers & Allied Craftsman v. Meese*, 761 F.2d

(continued...)

Nor, finally, is review warranted by petitioners' baseless claim that Congress has expressed some general "unwillingness to permit judicial review of immigration decisions concerning aliens outside the United States who have 'never presented [themselves] at the borders.'" Pet. at 14 (citing a single line of dictum in a footnote of a thirty-six year-old case, *Brownell v. Tom We Shung*, 352 U.S. 180, 184 n.3 (1956)). Courts have repeatedly permitted aliens located outside of the United States to obtain judicial review of immigration decisions affecting them.[17] Nor can petitioners plausibly inflate the narrow and anomalous rule against reviewability of visa decisions by consular officials, Pet. at 14 n.8, into a blanket bar against judicial review of a blatantly lawless interdiction policy, which is set by *nonconsular* executive officials and has nothing to do with individual visas.[18]

16.(...continued)
798 (D.C. Cir. 1985) (judicial review of INS guidelines for determining alien work entry available independent of § 1105a); *Occidental Engineering Co. v. INS*, 753 F.2d 766 (9th Cir. 1985) (judicial review available of denial to reclassify worker status of aliens independent of § 1105a); *Carnejo-Molina v. INS*, 649 F.2d 1145 (5th Cir. 1981) (judicial review available of denial of voluntary departure independent of § 1105a). Petitioners' reliance on *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984), *quoted in* Pet. at 13, is similarly misplaced, because respondents seek review of an unlawful immigration policy of summary return without screening, not "particular issues," i.e., a final administrative order of deportation, for which the INA has established a "detailed mechanism for judicial consideration." Pet. at 13-14, quoting *Block*, 467 U.S. at 349.

17. *See, e.g., Juarez v. INS*, 732 F.2d 58 (6th Cir. 1984) (reviewing legality of deportation order on behalf of alien outside the U.S.); *Silva v. Bell*, 605 F.2d 978, 984-85 (7th Cir. 1979) (reviewing INS interpretation of statute allocating visas on behalf of aliens living in U.S. and Mexico); *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977) (reviewing legality of deportation order on behalf of alien outside the U.S.).

18. The consular nonreviewability doctrine originated in the 1920s, long before the enactment of the APA and its strong presumption of judicial review, and survives today only because courts have construed specific provisions of the INA to have codified the doctrine. *See, e.g., Loza-Bedoya v. INS*, 410 F.2d 343 (9th Cir. 1969) (construing 8 U.S.C. § 1201); *see* (continued...)

In sum, petitioners offer no convincing reason why this Court should expend its energies on the meritless claim that their conduct is not reviewable under the APA, particularly when the opinion below rejected that claim without discussion and the two circuit courts have, without regard to that claim, reviewed the legality of the various Haitian interdiction programs on the merits.

II. Collateral Estoppel

Petitioners secondly ask this Court to sit as a court of error to review the question of collateral estoppel. Petitioners nowhere claim that the Second Circuit broke new ground in collateral estoppel law, only that that court misapplied settled preclusion principles.[19] Pet. at 14-17. A review of that inherently fact-bound issue would require this Court to parse case-specific issues of class definition that have been repeatedly examined by the courts below. Six of the seven judges who have considered petitioners' claim of collateral estoppel have now rejected it in five separate opinions, all noting that this case involves different

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18.(...continued)
generally J. Nafziger, *Review of Visa Denials by Consular Officers*, 66 Wash. L. Rev. 1, 30-34 (1991). The nonreviewability rule applies regardless of whether the alien applicant is in the United States or abroad, and thus derives from the nature of consular decisions, not from the location of the aliens. *See, e.g., Burrafato v. U.S. Dep't of State*, 523 F.2d 554 (2d Cir. 1975), *cert. denied*, 424 U.S. 910 (1976) (alien inside U.S. denied judicial review of consul's decision). Even consular decisions abroad have been judicially reviewed. *See* T.A. Aleinikoff & D. Martin, *supra*, n.15, at 337 (giving examples). Even assuming *arguendo* that the Eleventh Circuit relied on the consular nonreviewability doctrine in *Baker*—which challenged the adequacy of screening procedures—that doctrine has no applicability to the more extreme immigration policy challenged here, which returns all Haitians to Haiti without any screening or individualized consideration of the merits of their asylum claims.

19. Even if the Second Circuit's ruling on that issue were not plainly correct, Justices of this Court have repeatedly reiterated that "[t]he fact that a case may have been wrongly decided as between the parties is not, standing alone, enough to assure certiorari . . . ." J.M. Harlan, *Manning the Dikes*, 13 Rec. Bar Ass'n of City of N.Y. 541, 551 (1958).

parties and different circumstances than those present in the *Baker* case.[20] Nor can petitioners identify any circuit split on this issue because it was never considered, much less decided by, the Eleventh Circuit. Finally, if collateral estoppel were held to apply, this Court would not even reach the only arguably certworthy issue in this case, namely, whether § 243(h) applies extraterritorially. One could find no clearer example of improvident, *ad hoc* error-correction than if this Court were to grant review—ostensibly to resolve an issue of national importance—and then divert its energies to a settled and case-specific procedural question.

Moreover, the preclusion ruling below is correct. Petitioners protest that the Second Circuit's decision "flouts" the preclusive effect of the earlier decision in *HRC v. Baker*. Pet. at 14. Yet ironically, *petitioners* flout basic principles of preclusion by asking this Court to deny respondents their day in court. As the Second Circuit correctly reasoned, the *Baker* case involved both fundamentally different circumstances and different parties than currently stand before this Court.

First, as the court below found, the new interdiction policy challenged on this appeal did not yet exist—and hence could not be subjected to judicial review—in any prior action. Petitioners cannot brush aside their earlier representation to this Court when they successfully opposed certiorari months ago in *Baker*.[21] Petitioners concede that the executive policy now under challenge

20. *See* Pet. App. at 133a-136a (*HCC I* District Court Memorandum (3/27/92)) (Johnson, J.); *id.* at 149a-152a (*HCC I* District Court Memorandum (4/6/92)) (Johnson, J.); *id.* at 86a-96a (*HCC I* Court of Appeals Opinion) (Pierce & Cardamone, JJ.); *id.* at 7a-14a (*HCC II* Court of Appeals Opinion) (Pratt & Newman, JJ.); *id.* at 40a-41a (Newman, J., concurring). Judge Mahoney did not question the majority's rejection of petitioners' collateral estoppel claim in *HCC I* and dissented only on the merits. *See id.* at 118a-124a (*HCC I* Court of Appeals Opinion) (Mahoney, J., dissenting).

21. At that time, the Solicitor General expressly represented "that ['screened-in' individuals] are to be brought to the United States so that they could file an application for asylum under [the INA]." *See* Brief for United States in Opposition to Certiorari at 3, *HRC v. Baker*.

represents a change from "the government's then-current policy" when *Baker* was decided, but argue that "the entire thrust of the government's position was that the President must retain flexibility to respond to international developments free from judicial interference." Pet. at 16, n. 11. In fact, the thrust of the Solicitor General's earlier position was that this Court should not interfere with the Executive's "longstanding policy" of interdicting *and screening* Haitian refugees, particularly when screened-in refugees were being brought to the United States for asylum hearings accompanied by the full panoply of procedural rights. *See* Brief for United States in Opposition to Certiorari at 3, 8, *HRC v. Baker*. For preclusion purposes, the critical question is not whether petitioners knew that the representation was false when made, but whether circumstances have so changed *after that time* as to make it inequitable to permit petitioners to escape judicial review of their subsequent actions against different parties.

If petitioners had their way, a litigant could test the legality of a comparatively benign practice, then invoke collateral estoppel to hide behind that ruling in a subsequent action challenging an egregiously lawless practice that had not been implemented, announced or even hinted at when the prior practice was being adjudicated.[22] As the Second Circuit correctly reasoned:

> [W]hen the United States (a) resists Supreme Court review on a dramatic issue of such public import . . ., by representing that there will be screening of intercepted aliens followed by full consideration of asylum rights, (b) achieves the desired denial of *certiorari*, and then (c) embarks on a completely contrary policy, that is a change of the type that ought

22. For example, a school system could successfully defend itself against a claim of racial discrimination brought by black students outside the school system (*cf.* the "screened-out" refugees in *Baker*), then abruptly adopt dramatically discriminatory policies toward black students *within* the system (*cf.* the "screened-in" refugees in this case), claiming that preclusion doctrines immunized its newly lawless conduct from judicial examination.

> to permit an inferior court, unfettered by estoppel, to adjudicate the merits of a new case based on the new circumstances.

Pet. App. at 14a.[23]

Second, it is hornbook law that one cannot be bound by a prior judgment unless one was a party to, or represented by a privy in, the prior action. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 & n.7 (1979). As the Second Circuit recognized in *HCC I*, respondents could not have been part of the earlier Florida action, both because the named plaintiffs in the Florida action were screened-out while respondents are screened-in, and because the interests of the two groups with regard to the legality of screening were antagonistic. *See* Pet. App. at 93a-96a. The *Baker* class challenged the adequacy of the screening procedures and did not include any screened-in refugees, as those refugees had benefited by the procedures being challenged.[24] The courts below have agreed and ruled repeatedly that the respondents in

23. *See also id.* at 40a (Newman, J., concurring) (petitioners may not "keep the Eleventh Circuit ruling from the Supreme Court on a promise that is no longer being honored and then . . . keep our decision from the Supreme Court by asserting that we had correctly applied collateral estoppel. That would be gamesmanship of the rankest sort, especially inappropriate in a lawsuit affecting people's lives"); Restatement (Second) of Judgments § 28(2) (1982) (no preclusion where "a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws"); *id.* at § 28(5) (preclusion inappropriate where, as here, "[t]here is a clear and convincing need for a new determination of the issues (a) because of the potential adverse impact of the determination on the public interest . . ., (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary . . ., did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.").

24. In *Baker*, the fourteen named representatives were all screened-out. For that reason, the Second Circuit correctly concluded in *HCC I* "that the class defined in the Florida Action was overly broad" and that the claims of the screened-in plaintiffs were not fairly and adequately represented by the screened-out named plaintiffs. Pet. App. at 93a.

this action were not properly part of the class defined in the prior action. *See* Pet. App. at 133a-136a (*HCC I* District Court Memorandum (3/27/92)); *id.* at 149a-152a (*HCC I* District Court Memorandum (4/6/92)); *id.* at 86a-96a (*HCC I* Court of Appeals Opinion); *id.* at 7a-14a (*HCC II* Court of Appeals Opinion).

Furthermore, the *Baker* action involved a class of screened-out Haitians who were interdicted by petitioners *prior* to the Kennebunkport Order. As Judge Pratt noted, one of the requirements for membership in the *Baker* class was that the class member was interdicted pursuant to the *then-existing* United States Interdiction Program. Pet. App. at 9a. Unlike respondents, the screened-out *Baker* plaintiffs challenged the adequacy of the screening procedures, not the absence of any screening. The screened-out refugees have no interest in reinstituting screening, because even if they fled again, they likely would be screened out. By contrast, respondents here are "screened-in" refugees who already have been found to have credible fears of persecution. By both design and mistake, petitioners have forcibly returned these screened-in refugees to Haiti. If screening were reinstituted, many of these refugees would flee again and be screened in.

In short, respondents are entitled to have their claims heard on the merits because they were not properly parties to any prior action and the conduct of which they complain was not known to them at the time of and was not made a part of the prior action. This Court should not devote scarce briefing and argument resources to plenary review of a correct, fact-specific, and uncertworthy collateral estoppel ruling.

III. Equitable Principles

Nor is there any basis for granting review of the Solicitor General's fourth claim: that the Second Circuit transgressed a "fundamental limitation" in entering an injunction and failing to dismiss this case on the basis of 5 U.S.C. § 702(1). Pet. at 12, 28-30. This subsection of the APA provides that "[n]othing" in this section "affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." No court that has considered the Haitian refugee litigation, in either the Second

or the Eleventh Circuit, has relied on the language of this provision and even Judge Walker did not cite it in his dissent. Nor has this issue been fully briefed or argued in any court.[25] This Court should not for the first time take up this issue absent lower court guidance or any split in the circuits.

Moreover, the Solicitor General's reliance on this provision of the APA is misplaced. No court has ever suggested that this provision is, of its own force, a "fundamental limitation" on equitable relief. Pet. at 28. As the legislative history makes clear, the provision has no independent content, constituting nothing more than a congressional intent not to abrogate various other preexisting limits to judicial review. It was "not intended to affect or change defenses other than sovereign immunity" and all other defenses "remain unchanged." H.R. No. 1656, 94th Cong., 2d Sess. 12 (1976).[26] Thus, § 702(1) imposes no additional constraints on the availability of APA review or injunctive relief.

Absent this statutory underpinning, petitioners are left with the bald assertion that lower federal courts possess some sort of free-floating equitable power to find immigration injunctions "inappropriate," even after finding that actions of INS and other executive officials squarely violate statutes and treaties. Lower federal courts routinely grant injunctions in immigration cases.[27]

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25. Petitioners' brief in the Second Circuit contains only one short paragraph referring to section 702(1) of the APA. Brief for Appellees at 62.

26. This discussion also permeated the Senate Hearings on the provision. *See generally Hearing Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970). Nor does that legislative history reflect the sort of undue deference to executive prerogatives suggested by petitioners. *See, e.g.*, S. Rep. No. 996, 94th Cong., 2d Sess. 3 (1976) ("To the extent that this obsolete [sovereign] immunity doctrine prevents the orderly, rational review of actions of Federal officers, it is inconsistent with the principles of accountable and responsive Government.").

27. *See, e.g., Haitian Refugee Center, Inc. v. Nelson*, 694 F. Supp. 864 (S.D. Fla. 1988), *aff'd*, 872 F.2d 1555 (11th Cir. 1989), *aff'd sub nom. McNary v. HRC*, 111 S. Ct. 888 (1990) (enjoining INS from applying (continued...)

Nor does the APA entitle courts to withhold equitable relief in an immigration case simply because it touches upon foreign affairs.

Notwithstanding petitioners' claim that 5 U.S.C. § 702(1) creates a broad, standardless judicial discretion to deny equitable relief, the standards for granting injunctions are well-established and were applied correctly in this case. In the Second Circuit, "[t]he party seeking the [preliminary] injunction must demonstrate (1) irreparable harm should the injunction not be granted, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief." *Resolution Trust Corp. v. Elman*, 949 F.2d 624, 626 (2d Cir. 1991). Contrary to petitioners' assertion that "nothing in the record supports the notion that there is a threat of persecution to members of the respondent class of such pervasiveness and magnitude that it would . . . justify" the injunctive relief ordered below, Pet. at 30, n.17, the District Court found that petitioners "undeniably [made] a substantial showing of irreparable harm," Pet. App. at 166a. Petitioners did not even contest that showing before the Second Circuit, which noted the uncontested evidence that "heightened political repression [is] currently occuring in Haiti [and that] specific plaintiffs who had been returned have since been abused, were tortured and were in hiding in fear for their lives." *Id.* at 5a. Under the "two-court rule," these unchallenged factual findings deserve substantial deference from this Court. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *United States v. Ceccolini*, 435 U.S. 268, 273 (1978). Accordingly, petitioners' predictions that the injunctive relief ordered will cause a "loss of life" or that the

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27.(...continued)
procedures in Special Agricultural Worker application process depriving applicants of constitutional and statutory rights); *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982) (enjoining INS from depriving Haitians of due process by accelerating asylum and deportation proceedings); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (C.D. Cal. 1988), *aff'd sub nom. Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) (permanently enjoining INS from procedures exhibiting pattern and practice of violating rights of aliens held in INS custody).

embassy refugee program obviates the need for an injunction are contrary to the record, irrelevant, and totally unworthy of further review by this Court. Pet. at 28, 29 n.17.

Finally, petitioners' overblown claim that the injunction interferes with the conduct of foreign, military or diplomatic policy, Pet. at 28-29, was correctly and forcefully rejected by the Second Circuit.[28] That court found that Congress, in the exercise of its "'complete,' 'plenary' legislative power over immigration matters, *see Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909); *Boutelier v. INS*, 387 U.S. 118, 123 (1967), has spoken directly to the question at issue so that '[t]his is a job for the Nation's lawmakers, not for its military authorities.'" (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). Pet. App. at 37a.

For their claim that lower federal courts have a broad roving power to deny equitable relief, petitioners cite *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985), which is inapposite here. *Sanchez-Espinoza* involved a request for equitable relief against federal officials to stop torts committed by U.S-funded military actors during a war in Nicaragua. In *Sanchez-Espinoza*, there was no federal statute, such as § 243(h) here, that by plain language imposed a mandatory duty on executive officials that the court could enforce.[29]

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28. As the Second Circuit pointed out, that claim is rendered all the more suspicious by Section 3 of the "executive order, [which] specifically states that it was 'intended only to order the internal management of the Executive Branch.'" Pet. App. at 37a.

29. Petitioners also cite the dissenting opinion in *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1561 (D.C. Cir. 1984) (Scalia, J., dissenting), *vacated on other grounds*, 471 U.S. 1113 (1985). In *Ramirez*, the *en banc* majority found that a federal court "must take jurisdiction" of a complaint that "is neither insubstantial nor frivolous." *Ramirez*, 745 F.2d at 1533. As in *Ramirez*, the injunction here does not run extraterritorially, but against "officials of the United States government present in Washington, D.C." *Id.* at 1531. In such cases, "it is the role of the courts within the constitutional scheme." Judge Wilkey wrote, "to adjudicate and remedy claims of actual injury resulting from specific, unlawful Executive action." *Id.* at 1531.

Likewise, the claim that the injunction will "undermine the ability of this Nation to speak with one voice," Pet. at 29, is a sham. Here it is Congress and the President who have spoken with one voice upon enacting § 243(h) of the INA and it is petitioners who are disrupting that single voice with their new interdiction policy.[30] Petitioners can harmonize national policy with statutory and treaty law simply by obeying § 243(h) and Article 33 of the Refugee Convention, as they did for the previous decade.

In sum, this Court should not review the appropriateness of the granting of equitable relief as that issue was neither fully briefed nor argued below, no circuit split exists with regard to that issue, and no lower court has relied on the APA provision now resurrected by petitioners. Neither statute nor judicial precedent authorize lower federal courts to refuse to enforce the law or to exercise an unchecked and unchartered power to dismiss cases that are properly before them.

IV. The Judgment Below Is Correct

The decision below rests on the simple, unassailable logic that Congress meant what it said when it rewrote § 243(h) in 1980. The Second Circuit held only that when Congress directed that the Attorney General "shall not . . . return any alien . . . to a country" where she faced political persecution, it meant just that. Petitioners would have this Court read "shall not" to mean "may," "return" to mean "expel," and "any alien" to mean "any alien within the United States." In effect, petitioners would rewrite Congress' words to read: "the Attorney General is authorized, in his unreviewable discretion, to expel any alien who is not within the United States to a country where such alien's life or freedom would be threatened on account of . . . political opinion." Yet ironically, that language is nearly identical to the

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30. As noted above, the Executive itself has spoken with more than one voice on this issue, previously reading Article 33.1 in a contrary fashion. *Supra*, n.3. As the Second Circuit said, "it is not clear here precisely what position of the [executive] this court ought to defer to...." Pet. App. at 30a.

text that Congress amended when it passed the 1980 Refugee Act. *See* p. 2, *supra*. As Judge Pratt noted, "[t]o accept the government's reading of the statute, we would in effect be reading . . . words . . . back into § 243(h)(1) . . . which would counter Congress's plainly expressed intent" to change those words in 1980. Pet. App. at 18a.

The Second Circuit's ruling is only bolstered by petitioners' concession that the 1980 Refugee Act revised § 243(h) "to conform its language to Article 33" of the Refugee Convention. Pet. at 22. That self-executing provision states even more categorically that "[n]o Contracting State shall expel or return ('*refouler*') a refugee in *any manner whatsoever to the frontiers* of territories where his life or freedom would be threatened" on account of his political opinion. Pet. App. at 253a (emphasis added). The most natural reading of this language is that the United States shall not return to Haiti Haitian refugees who are fleeing persecution. Yet by their own admission, petitioners would rewrite the treaty language to read that "[n]o Contracting State shall expel or *expel* a refugee *from the "Contracting State" to a foreign territory in the specified circumstances, irrespective of the manner in which the removal might be accomplished.*" Pet. at 22 (emphasis added).

Petitioners would overturn the majority opinion below based not on the explicit and uncontrovertible words of the statute and treaty, but on a patchwork of inapposite presumptions, negative inferences, text from other statutory provisions, snippets of legislative and negotiating histories, and their own reinterpreted litigation positions, all stitched together to stand § 243(h) and Article 33 on their heads. Pet. at 17-28. The Second Circuit fully considered and correctly rejected each of these contentions. Moreover, petitioners barely address the most fundamental purpose of 243(h)--to conform United States law with our humanitarian international obligations under Article 33 of the Refugee Convention not to aid and abet persecutors by delivering fleeing refugees into their hands.

Petitioners first invoke a "general presumption" against extraterritoriality derived from *EEOC v. Arabian Am. Oil Co.*,

111 S. Ct. 1227, 1230 (1991) (*Aramco*). Pet. at 17-19. Yet as the court below stressed, petitioners may invoke a "general presumption" against extraterritoriality only where there is an "unexpressed congressional intent," *Foley Bros. Inc. v. Filardo*, 336 U.S. 281, 285 (1949). In 1980, Congress' intent to apply § 243(h) extraterritorially was not "unexpressed," but clearly stated, not only in its unrestricted definition of "alien," but also through the intentional deletion of the "within the United States" phrase from § 243(h), and Congress' repeated declarations that it was amending that provision to conform U.S. law with Article 33 of the Refugee Convention, which the Court of Appeals found applies outside the territorial United States. Equally significant, both *Aramco* and Justice Stevens' concurring opinion in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2150 n.4 (1992), Pet. at 19 n.12, 20, denied extraterritorial application of a statute to activities of private litigants *within a sovereign state*. Thus, both of those opinions implicate comity concerns, which are missing when American law is applied on the high seas, where no single state is sovereign.[31]

Second, petitioners claim that § 243(h) binds only the Attorney General, Pet. at 20, thereby asking this Court to accept the absurd proposition "that the proscription of § 243(h)(1)—returning an alien to his persecutors—was forbidden if done by the attorney general but permitted if done by some other arm of the executive branch." Pet. App. at 21a.

Third, petitioners invoke § 243(h)(2)(C), which withholds the benefits of non-return to aliens who have committed serious nonpolitical crimes before arriving the United States. But if, as petitioners claim, § 243(h) were to apply only to aliens "within the United States," the need for the specific reference in (2)(C) to "arrival in the United States" would be entirely superfluous. Pet. App. at 18a-19a. As Judge Pratt noted, to accept petitioners' invitation to read the territorial limititation in § 243(h)(2)(C) back

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31. Nor can petitioners explain why §§ 212(f) and 215(e) of the INA should provide *authority* for their extraterritorial acts, while § 243(h) imposes no concomitant extraterritorial restraint on those activities.

into § 243(h)(1) would effectively nullify Congress' plain intent in eliminating those limiting words in 1980. Pet. App. at 19a.

Fourth, petitioners attribute great significance to the fact that § 243(h) is located in Part V of the INA, entitled "Deportation; Adjustment of Status." Pet. at 21. But as the court below recognized, the location of § 243(h) is an historical relic of no significance. Pet. App. at 19a-21a. Moreover, petitioners' contention is undercut by their argument elsewhere that the language of § 243(h) necessarily applies to *exclusion* proceedings, which are *not* encompassed within Part V of the Act, but in Part IV ("Provision Relating to Entry and Exclusion"). If, as petitioners claim, § 243(h)'s location limits its applicability to aliens in deportation proceedings, it could not act as it undeniably does to protect aliens in exclusion proceedings.

Fifth, petitioners entirely ignore that at the same time Congress deleted the words "within the United States" from § 243(h), it added the asylum provision, § 208, 8 U.S.C. § 1158, which expressly applies only to aliens who are "physically present in the United States." Thus, when Congress intended to limit a provision of the Refugee Act to persons within the United States, it said so explicitly (using the unambiguous "physically present in the United States" language). Where the statute specifically deleted the geographic limit, Congress intended none.[32]

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32. Both the Refugee Convention and the Refugee Act of 1980 sought to establish a tripartite scheme for refugee protection: § 243(h), which creates a right of *non-refoulement* applicable wherever a government encounters refugees; § 208, which establishes asylum procedures for those physically present in the United States; and § 207, which authorizes refugee processing for refugees applying from overseas. Each provision has independent statutory authority. Only § 208 specifically limits its protections to aliens "physically present in the United States." Petitioners concede that although § 207 does not say so explicitly, that section applies to aliens outside the U.S. Petitioners cannot explain why § 243(h), which similarly contains no such limitation and specifically dropped the words "within the United States," should be construed to *require* presence in the United States.

Similarly, petitioners reach past Article 33's plain language to demand judicial deference to a newly minted executive reinterpretation, *see supra*, note 3. They also cite a strained reading of the statements of two foreign delegates—never commented on by the United States and never presented to or considered by the Senate during the 1968 ratification of the U.N. Protocol—as somehow indicative of U.S. intent regarding the provision. Pet. at 22-26. Once again, on these issues, the Second Circuit's contrary conclusions are entirely correct and sensible. Pet. App. at 23a-35a. As Judge Newman observed, the command of both § 243(h) and Article 33 are "absolute: the alien shall not be returned to face persecution. That command cannot be circumvented by seizing the alien as he approaches our border, whether by land or by sea, and returning him to his persecutors." Pet. App. at 42a.

Finally, petitioners speculate that Congress added the words "or return" to § 243(h) in 1980 and removed the reference to any alien "within the United States," to address the *exclusion* of excludable aliens who are physically inside but legally still outside the United States. Pet. at 26-27.[33] This construction ignores that other provisions of the INA carefully employ the term "deport" to encompass both deportation and exclusion proceedings, and would thereby render the word "return" a wholly superfluous part of the statute. *See, e.g.*, 8 U.S.C. §§ 1225(c), 1227(a)(1), 1251(a)(1). Given that the term "deport"

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33. Petitioners offer the speculative hypothesis that Congress deleted the phrase "within the United States," to extend § 243(h)'s benefits narrowly to excludable aliens, thereby mitigating this Court's holding in *Leng May Ma* v. *Barber*, 357 U.S. 185 (1958) (excludable aliens paroled into the U.S. may not claim § 243(h) relief). Yet petitioners point to nothing in the legislative history that proves that Congress had *Leng May Ma* in mind, that explains why it took Congress so long to repair the statute, or that explains why Congress did not substitute other limiting language for "within the United States" rather than removing the geographic limit altogether. Petitioners cannot explain why Congress should have silently imposed such a limit, when it was plainly amending § 243(h) to implement Article 33 of an international human rights treaty that was intended to have the widest possible scope.

applies to individuals within the United States, the word "return" acquires meaning only if it applies, as the Second Circuit held and as the plain reading compels, to aliens *outside* the territorial limits of the United States. Pet. App. at 22a-23a.

In short, the Second Circuit's reasoning on the merits is correct, effectuates the plain language of statute and treaty, and should not be disturbed.

CONCLUSION

For the foregoing reasons, this Court should deny the Solicitor General's petition for certiorari. If the writ is granted, the Court should limit its review to the question whether the laws of the United States, including Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h), bar executive officials from summarily returning Haitian aliens to Haiti, where their life or freedom would be threatened on account of political opinion.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Immigration and Nationality Act § 243(h), 8 U.S.C. 1253(h)	1, 2, 3, 5, 6, 8, 9
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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-344

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

A. As the Second Circuit recognized in the decision below, Pet. App. 14a, its holding that Section 243(h) of the Immigration and Nationality Act (INA), 8 U.S.C. 1253(h), applies to the repatriation of Haitian migrants interdicted on the high seas squarely conflicts with the Eleventh Circuit's holding on that precise issue in *Haitian Refugee Center* v. *Baker*, 953 F.2d 1498, cert. denied, 112 S. Ct. 1245. In their August 3, 1992, motion to expedite consideration of this case, filed after the Court granted our application for a stay of the decision below, respondents specifically represented (at 2) that they "do not intend to oppose the granting of the writ on this issue." Indeed, they affirmatively urged the Court to *grant* certiorari—noting that "[i]n ruling on the stay

application, all nine members of this Court indicated their belief that there is a reasonable probability that certiorari will be granted on this question," Motion at 2—and to do so expeditiously, by treating our application for a stay as certiorari petition.

Now, without even acknowledging their prior submission, respondents have filed a brief opposing certiorari. But they advance no substantial reason why the Court should do so. To the contrary, respondents acknowledge (Br. in Opp. 3, 10) that the question of the extraterritorial application of 8 U.S.C. 1253(h) "divides the circuits" and presents a "direct conflict." Respondents simply assert (Br. in Opp. 1, 10) that review should be denied because the decision below is correct. It is not. The decision of the sharply divided panel below is gravely flawed in four fundamental respects, each sufficient in itself to warrant reversal.[1] But in addition, respondents' view of the decision below on the merits scarcely counsels against review, since two courts of appeals have reached directly conflicting results in broad class actions challenging the ongoing Haitian interdiction program. The result of the decision below is not only to prevent the United States from speaking with one voice (through the President) to the international community regarding

[1] For example, the only textual basis the court of appeals cited as affirmative support for its holding that 8 U.S.C. 1253(h) applies outside the United States was Section 1253(h)'s reference to "any alien." See Pet. App. 15a-16a, 21a, 23a. However, this Court has made clear that such general language does not overcome the presumption against extraterritorial application of Acts of Congress. See *Foley Bros.* v. *Filardo*, 336 U.S. 281, 282, 285 (1949); Pet. 17. Moreover, as we explain in the petition (at 17-28), all other indications in the text and legislative history of Section 1253(h)—as well as the text, negotiating history, and consistent State Department interpretation of the U.N. Convention on which Section 1253(h) is based—strongly support the conclusion that Section 1253(h) does not apply to aliens outside the United States.

the Nation's response to the Haitian migrant crisis, but also to prevent the courts themselves from speaking with one voice to the President and other Executive Branch officials regarding the scope of their discretion in fashioning that response. The Court should eliminate this dissonance on a matter of such major importance to the foreign policy of the United States and the administration of the immigration laws.

B. As a fallback position, respondents argue that if the Court grants certiorari, it should limit its review to the question of the extraterritorial reach of 8 U.S.C. 1253(h). Thus, they urge the Court to deny certiorari on the three other issues presented by our certiorari petition: whether judicial review is precluded by statute (see Pet. 12-14); whether respondents' claim under 8 U.S.C. 1253(h) is barred under principles of collateral estoppel by the Eleventh Circuit's decision in *HRC* v. *Baker* (see Pet. 14-17); and whether equitable principles bar entry of an injunction that interferes so drastically with responsibilities that the Constitution assigns to the President (see Pet. 28-29). See Br. in Opp. 1, 3, 10-23, 29. Yet even as respondents try to avoid having this Court consider these alternative grounds for reversing the judgment below, they state (Br. in Opp. 10 n.11) that they intend to urge alternative grounds for affirming that judgment. This is not the time for such tactical maneuvering.

Over the past year, the program established by the President for interdiction and repatriation of Haitian migrants has been the subject of repeated judicial assaults, which have consumed enormous resources of the lower courts and this Court, as well as Executive Branch agencies charged with implementing the President's policies. It is time to bring that litigation to a close. The Court should assure that it will be in a position to do so by having before it *all* of the issues and con-

sidérations that may bear on the proper disposition of the case.

1. The overriding question presented by this case remains precisely what we have stated it to be in the certiorari petition (at i): "Whether the court of appeals properly ordered the district court to enter a preliminary injunction barring implementation of Executive Order 12,807, which was issued by the President on May 24, 1992, to authorize repatriation directly to Haiti of Haitian migrants interdicted by the United States Coast Guard on the high seas." As we explain in the petition (at 11-12, 28-29), that injunction intrudes intolerably into matters assigned by the Constitution to the President: it interferes directly with the operation of military vessels under his command on the high seas; it upsets the delicate balance of diplomatic and other measures instituted by the President to restore democratic rule in Haiti and resolve the broader crisis affecting that country; and it threatens to induce a new and massive outflow of Haitian migrants that would once again strain the President's ability to carry out the Nation's immigration policy and enforce its immigration laws in the region. These consequences render this case one of great public importance that warrants review by this Court quite aside from the presence or absence of a circuit conflict on every issue subsumed in the central question of whether such an injunction should have been granted. The injunction is improper on four independent grounds, and there is no reason why the Court should artificially limit its review to only one of them.

2. Respondents nevertheless try to minimize the importance of the issues they seek to avoid by labeling them "extraneous" and "collateral" and as "lacking significance." See Br. in Opp. 3, 10. None of those labels is accurate.

a. The questions whether judicial review is altogether foreclosed by statute—and whether respondents' challenge to the interdiction program under 8 U.S.C. 1253(h) is barred as a threshold matter under collateral estoppel principles by virtue of the Eleventh Circuit's judgment in *HRC* v. *Baker*—are not extraneous or collateral. They are, instead, "antecedent" to the merits of respondents' challenge and are "ultimately dispositive of the present dispute." *Arcadia* v. *Ohio Power Co.*, 111 S. Ct. 415, 418 (1990). Indeed, "congressional preclusion of review is in effect jurisdictional," *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 353 n.4 (1984), which underscores the need for this Court to have that issue before it at the outset.[2]

b. As respondents concede (Br. in Opp. 11), the Eleventh Circuit in *HRC* held that the INA *does* impliedly "preclude judicial review" here under the APA (5 U.S.C. 701(a)(1)), because the INA expressly provides for judicial review of refugee determinations and other issues at the behest of aliens in the United States, but not those beyond our borders. See Pet. App. 204a-209a. Because the Eleventh Circuit's reasoning on the preclusion issue should foreclose judicial review here, the *HRC* decision weighs strongly in favor of certiorari on that issue in this case.[3]

[2] The Court has held that although "congressional preclusion of judicial review is in effect jurisdictional" under *Block*, the issue may be waived by the government if it is not properly preserved. See *Air Courier Conf.* v. *American Postal Workers' Union*, 111 S. Ct. 913, 917 n.3 (1991). There is no suggestion in this case, however, that the government has waived the preclusion issue. We presented that issue below (Gov't 92-6144 C.A. Br. 59-63) and in our certiorari petition (at 28-29). Compare *Air Courier*, 111 S. Ct. at 917.

[3] As respondents point out, the Eleventh Circuit in *HRC* nevertheless considered (and rejected) on the merits the Haitian interdictees' challenge to the interdiction program under 8 U.S.C.

The same is true of the collateral estoppel issue. Respondents have previously conceded that certiorari is warranted in this case because the holding below on the reach of 8 U.S.C. 1253(h) squarely conflicts with the contrary holding in *HRC*. If the Court grants review on that issue, it would make no sense for the Court to close its eyes to the even more basic question of whether the holding in *HRC* not only conflicts with—but actually forecloses—respondents' reliance on 8 U.S.C. 1253(h) here.[4]

1253(h), finding that Section inapplicable to aliens beyond our borders. See Pet. App. 214a-216a. In doing so, the Eleventh Circuit identified no basis for judicial review independent of the APA. And there is none, since the APA is the only federal statute of any conceivable application here that authorizes a cause of action against federal officials. Nor do respondents offer any legal support for a cause of action independent of the APA. See Br. in Opp. 11 n.12.

[4] The collateral estoppel issue should be before the Court for an additional reason. Respondents defend the Second Circuit's refusal to find their reliance on 8 U.S.C. 1253(h) barred by collateral estoppel on the ground that the *HRC* class consisted of interdictees who were challenging the initial screening process, while the respondents here "already have been found to have credible fears of persecution" and were "screened in." See Br. in Opp. 18-19. This description of the interdictees before this Court conforms to the only class that has thus far been certified by the district court—the class of "screened in" interdictees who were challenging the procedures for reinterviewing at Guantanamo those "screened in" individuals who were found to have a communicable disease. Pet. App. 161a-162a. (Those procedures were the subject of the Second Circuit's June 10 decision that, relying on the Due Process Clause, requires that screened-in interdictees at Guanatanmo be afforded a right to counsel in connection with any further interviews there. *Id.* at 73a-124a.)

Thus, even if the Second Circuit's legal ruling regarding the extraterritorial application of 8 U.S.C. 1253(h) were correct, respondents effectively concede in this Court that an injunction properly could only run in favor of those Haitian migrants who had been

c. In addition, whether the INA forecloses any role for the courts in circumstances such as these is an important issue that warrants certiorari in its own right. Congress's traditional unwillingness to permit judicial review of immigration decisions concerning aliens who have "never presented [themselves] at the borders," *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184 n.3 (1956), serves to recognize and preserve the primacy and discretion of the President and those in the Executive Branch who implement his policies affecting foreign nations and their nationals abroad. The President's policies in such areas should not be held to be subject to judicial review in the absence of a statute expressly so providing. *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2775-2776 (1992). As the experience surrounding this case and *HRC* amply demonstrates, judicial second-guessing of the Executive's policy judgments in this setting can profoundly disrupt military operations and the conduct of the Nation's foreign policy. Even if the Court rejects respondents' challenge on the merits, the fact that litiga-

tentatively screened in prior to issuance of the May 24 Executive Order, who were thereafter repatriated to Haiti, and who might once again take to the seas and be interdicted. According to respondents' own estimate below, there are only approximately 150 Haitians who were once tentatively screened in but were subsequently repatriated to Haiti. See Resp. 92-6144 C.A. Br. 43. Yet the courts below have enjoined implementation of the May 24 Executive Order with respect to *any* Haitian interdictees, without limiting relief to those who had been interdicted once before and tentatively screened in. See Pet. App. 39a, 170a.

Respondents argued below that the class of "screened in" interdictees certified by the district court also includes interdictees who had *not* already been screened in, but who would be in the future if the initial screening that was conducted prior to the May 24 Executive Order were still in place. See Resp. 92-6144 C. A. Br. 45 n.91. Respondents do not, however, renew that strained argument in this Court.

tion such as this was permitted to go forward would establish disturbing precedent for allowing more such litigation in the future.

The Second Circuit's refusal to apply collateral estoppel also raises substantial concerns. It was bad enough that implementation of the interdiction program was disrupted by the series of injunctive orders in *HRC* v. *Baker*, which made it difficult for the Nation to present a coherent response to the Haitian migrant crisis. But after this Court stayed the injunction in *HRC*, the Eleventh Circuit rejected all of the Haitian interdictees' legal challenges, and this Court then denied certiorari (thereby restoring to the President the flexibility he requires in addressing the Haitian migrant crisis), it was far worse for the Second Circuit to revisit those legal issues and enjoin the interdiction program all over again. Due respect for a coordinate Branch and the adverse consequences of renewed injunctive relief should have led the courts below to respect and enforce the doctrine of collateral estoppel with particular resolve. Instead, the Second Circuit strained to avoid collateral estoppel so as to entertain relitigation of the issues decided in *HRC*. See Pet. 15-17.

d. Finally, the propriety of the extraordinary injunctive relief ordered below (or other equitable relief) presents issues of similar importance at the outset of the case. For the question is not simply whether an injunction should have issued once the court of appeals construed 8 U.S.C. 1253(h) (and Article 33 of the U.N. Convention) to apply in this setting. It is also whether the courts below should even have entertained this suit for injunctive or other equitable relief (and therefore even have reached the issue of the application of 8 U.S.C.

1253(h) and Article 33).[5] The bottom line is that they should not have done so, since this suit was brought by aliens abroad who seek to have the courts of the United States declare invalid and halt military operations and related actions undertaken by the President of the United States with respect to the very country (Haiti) of which the plaintiff aliens are residents and nationals. If such a suit is not altogether barred here by the INA or collateral estoppel, injunctive relief (especially *preliminary* injunctive relief) must be denied—and the suit dismissed—under established equitable principles.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted in all respects.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SEPTEMBER 1992

[5] See 5 U.S.C. 702(1) (emphasis added) (the Administrative Procedure Act's waiver of sovereign immunity does not excuse courts from their duty "to dismiss any action *or* deny relief on any other appropriate legal or equitable ground").

No. 92-344

In the Supreme Court of the United States

OCTOBER TERM, 1992

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: AUGUST 24, 1992
CERTIORARI GRANTED: OCTOBER 5, 1992

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U.S. DISTRICT COURT
NEW YORK EASTERN
(BROOKLYN)

Civil Docket for Case # : 92-CV-1258

HAITIAN CENTERS, ET AL.

v.

MCNARY, ET AL.

RELEVANT DOCKET ENTRIES

Date	No.	PROCEEDINGS
3/18/92	1	COMPLAINT filed and summons(es) issued for Gene McNary, William P. Barr, James Baker III, Robert Kramek, Kime, Commandants, US Coas, U.S. Naval Base FILING FEE $120.00 RECEIPT #138354
		• • • • •
3/20/92	5	ORDER, that dft must opposition papers to plaintiff's application for a temporary restraining order by 3/20/92; and any reply by dfts by 3/23/92. (signed by Judge Sterling Johnson Jr., 3/18/92)
3/23/92	6	Calendar entry: before Judge Johnson on 3/17/92. Case called. All counsel present. Order to show cause for Tro and preliminary injunction hearing held. Motion hearing continued to 3/18/92 at 4:15.
3/23/92	7	Calendar entry: before Judge Johnson on 3/18/92. Case called. All counsel present. Order to show cause for TRO and Preliminary Injunction hearing held. Decision reserved. Govt's to submit response papers by 3/20/92.

Date	No.	PROCEEDINGS
3/24/92	8	REPLY by Haitian Centers, National Coalition, Immigration Law, Frantz Guerrier, Pascual Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, Roges Noel, A. Iris Vilnor, Mireille Berger, Yvrose Pierre, Mathieu Noel to response to dfts' memorandum in opposition to plaintiffs' motions for temporary restraining order and expedited discovery. [Entry date 03/25/92]
3/24/92	9	EXHIBITS IN SUPPORT OF PLAINTIFF'S REPLY TO DFTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND TO DFT'S OPPOSITION TO PLAINTIFF'S MOTION FOR DISCOVERY filed. [Entry date 03/25/92]
		• • • • •
3/27/92	13	MEMORANDUM-DECISION AND ORDER: that dft are TEMPORARILY RESTRAINED FROM: (a) denying plaintiff service organization access to their clients for the purposes of providing them legal counsel, advocacy, and representation; (b) interviewing, screening, any Haitian citizen currently being detained on Guantanamo. It is Ordered that expedited discovery be granted—(i) dfts' must produce documents for inspection and copying by 3/31/92; and (ii) plaintiffs are granted leave to serve and depose dfts on 4/1/92 at 9:00; and it is further Ordered that dfts or their attorneys show cause on 4/1/92, why an order should not be entered granting plaintiffs' request for preliminary injunction. (signed by Judge Sterling Johnson Jr., 3/27/92) (for more details, see ORDER) [Entry date 03/31/92]
		• • • • •

Date	No.	PROCEEDINGS
4/1/92	16	MEMORANDUM by Haitian Centers, National Coalition, Immigration Law, Frantz Guerrier, Pascual Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, Roges Noel, A. Iris Vilnor, Mireille Berger, Yvrose Pierre, Mathieu Noel in support of their MOTION for a Preliminary Injunction filed. EXHIBITS 30-67 attached.
4/3/92	17	MEMORANDUM by Gene McNary, William P. Barr, James Baker III, Robert Kramek, Kime, Commandants, US Coas, Commander, U.S. Nava in opposition to plaintiff's motion for Provisional Class Certification filed. [Entry date 04/06/92]
		• • • • •
4/6/92	21	Declaration of Captain Paul Blayney Chief, Operations Division, U.S. Coast Guard Atlantic Area.
4/6/92	22	TRANSCRIPT filed for telephone conference for dates of 3/28/92
4/7/92	23	MEMORANDUM AND ORDER: that the dfts are preliminarily enjoined from (a) denying plaintiff service organizations access to their clients for the purpose of providing them legal counsel, advocacy, and representation when scheduled for interviews; (b) interviewing, screening, or subjecting to exclusion or asylum proceedings any Haitian Citizen currently being detained on Guantanamo; and (c) repatriating any Haitian alien being detained on Guantanamo. (signed by Judge Sterling Johnson Jr., 4/6/93) [Entry date 04/08/92]

Date	No.	PROCEEDINGS
4/8/92	24	NOTICE OF APPEAL by Gene McNary, William P. Barr, James Baker III, Robert Kramek, Kime, Commandants, US Coas, Commander, U.S. Nava. Notice of appeal and certified copy of docket sent appealing [23-1] order. NO FEE. Aff of service attached. C of A notified.
4/8/92	25	MEMORANDUM AND ORDER: that the govt's motion to stay the execution of the preliminary injunction ordered by this Court dtd 4/6/93 id DENIED. (signed by Judge Sterling Johnson Jr., 4/8/92)
4/8/92	26	Calendar entry: Before Judge Johnson on 4/8/92 at 2:00 p.m. Case called for motion hearing. Counsel for all sides present via telephone except AUSA Scott Dunn. Deft's motion to stay preliminary injunction heard. Decision reserved. The court later denied deft's motion in a written order. [Entry date 04/09/92]
		* * * * *
4/20/92	35	MOTION by Gene McNary, William P. Barr, James Baker III, Robert Kramek, Kime, Commandants, US Coas, Commander, U.S. Nava to dismiss, Motion hearing [35-1] motion
4/20/92	36	GOVT EXHIBITS filed.
		* * * * *
4/20/92	38	ORDER filed at the USCA on 4/21/92 that the motion for stay pending appeal and expedition is DENIED so ordered by the USCA. Appeal is expedited. Appellant shall serve and file a brief on 4/17/92. Appellee shall file a brief by 4/24/92. Any reply brief shall be filed by 4/29/92. Argument shall be heard during the week of 5/4/92 on 5/7 or 5/8/92 subject to approval of presiding judge of that panel. Ackn mailed. Judge notified. USCA #92-6090. [Entry date 04/21/92]

Date	No.	PROCEEDINGS
4/21/92	40	NOTICE OF APPEAL by Gene McNary, William P. Barr, James Baker III, Robert Kramek, Kime, Commandants, US Coas, Commander, U.S. Nava Defendants/Appellants. Notice of appeal and certified copy of docket sent appealing [39-1] order. [Entry date 04/23/92]
4/22/92	39	ORDER: to clarify the relief granted in the Memorandum and Order of 4/6/92: it is ORDERED that the govt is enjoined from: (a) denying the Haitian Service Organizations immediate access, on Guantanamo, to any member of the class of Screened in Plaintiffs subject to resonable time, place and manner limitations. (b) interviewing, screening, or subject to exclusion or asylum proceedings any Screened In Plaintiff who has been denied an opportunity to communicate with counsel; and (c) repatriating any member of class of Screened In Plaintiffs who was subjected to a second interview at which time s/he was screened out, until such time as such individual is afforded an opportunity to communicate with the Haitian Service Organizations and given another interview. Notwithstanding paragraphs (b) and (c), the govt may, at any time, transport members of the Screened In Plaintiff class to the mainland U.S. in accordance with the govt's representations to this Court. (signed by Judge Sterling Johnson Jr., 4/15/92)
4/22/92	41	MEMORANDUM AND ORDER: that the govt's application to stay the enforcement of paragraph "(a)" of the Order of 4/15/92 is denied. (signed by Judge Sterling Johnson Jr., 4/16/92) [Entry date 04/24/92]
		* * * * *

Date	No.	PROCEEDINGS
4/28/92	50	Letter dtd 4/22/92 from Francis Lorson to Kenneth Starr enclosing order re this case. (Order attached) [Entry date 04/30/92]
		* * * * *
5/1/92	55	MEMORANDUM AND ORDER: "In light of the U.S. Supreme Court's recent stay of the preliminary injunction this court issued on 4/6/92, and clarified on 4/15/92, I am declining to sign the plaintiffs' application for a temporary restraining order at this time. The plaintiffs are hereby granted leave to renew their application following the disposition of the expedited appeal by the U.S. Court of Appeals for the Second Circuit. So Ordered." (signed by Judge Sterling Johnson Jr., 4/27/92)
		* * * * *
5/28/92	60	Letter dtd 5/28/92 from Harold Koh to Judge Johnson enclosing the immediate issuance of a temporary restraining order pending a hearing on a request for a preliminary injunction. Order to Show Cause for a temporary restraining order w/exhibits A-I attached, but UNSIGNED. [Entry date 05/29/92]
6/1/92	61	ATTACHMENTS IN SUPPORT of dfts' opposition to the entry of injunctive relief respecting the new executive order.
6/1/92	92	Dfts' OPPOSITION to the entry of injunctive relief respecting the new executive order.
6/2/92	63	Documents enclosed in an envelop—Attach to end of exhibit 88. Submitted by Simpson Thacher & Bartlett.
6/2/92	64	Plaintiffs REPLY to dfts' opposition to plaintiffs' order to show cause filed. [Entry date 06/03/92]
		* * * * *

Date	No.	PROCEEDINGS
6/8/92	67	NOTICE OF APPEAL by Haitian Centers, National Coalition, Immigration Law, Frantz Guerrier, Pascual Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, Roges Noel, A. Iris Vilnor, Mireille Berger, Yvrose Pierre, Mathieu Noel Defendants/Appellants Fee Paid $105.00 Receipt #140939. Notice of appeal and certified copy of docket sent appealing [66-1] order. Ackn of service attached. C of A notified. [Entry date 06/09/92]
6/9/92	66	ORDER dated 6/5/92 order that the relief sought by plaintiffs on order to show cause for a temporary restraining order pursuant to F.R. Civ. P. 65 restraining the Govt. repatriating any Haitian to Haiti, is denied. (signed by Judge Sterling Johnson Jr.)
		* * * * *
6/15/92	69	MANDATE OF USCA dtd 6/10/92 Re: [67-1] appeal. Judgment of District Court is affirmed as modified in accordance with the opinion of USCA. Judge notified. Acknowledgment returned to USCA. USCA #92-6090 and 92-6104. Issued as Mandate 6/11/92.
7/30/92	70	ORDER: In accordance with the 7/29/92 decision of the Court of Appeals for the 2nd Circuit reversing this court's decision in Memorandum and Order dtd 6/5/92 and remanding the case to this court with instructions to enter an injunction, it is Ordered, that the dfts are preliminarily enjoined from returning to Haiti any interdicted Haitian whose life or freedom would be threatened on account of his or her race, religion, nationality, membership in a particular social group, or political opinion. (signed by Judge Sterling Johnson Jr., 7/29/92)

Date	No.	PROCEEDINGS
8/4/92	71	MANDATE OF USCA (certified copy) Re: [67-1] appeal, [40-1] appeal, [24-1] appeal. The Order of the District Court is REVERSED and REMAND with direction to grant the injunction requested by plaintiffs. Majority opinions attached with dissents in a separate opinion. Issued as mandate on 7/29/92. Judge notified. Ackn mailed. USCA #92-6144. (See document for further details).
8/5/92	72	MANDATE (ORDER) filed at the USCA on 7/30/92 the motion of the United States to recall and stay this Court's mandate, it is ORDERED that the injunction issued 7/29/92 by the District Court in conformity with our mandate is stayed for 48 hours to permit the orderly consideration of such further application for a stay as the U.S. may seek from the Supreme Court or a Justice thereof. Judge Walker would grant the motion for a stay in full. Judge notified. Ackn mailed. USCA #92-6144.
8/10/92	—	Record on appeal returned from U.S. Court of Appeals: [67-1] appeal, [40-1] appeal, [24-1] appeal
8/17/92	73	Letter dtd 8/3/92 from Clerk Lorson from the Supreme Court to Judge Starr enclosing order of 8/1/92. (Copy of order attached.)
		• • • • •
9/22/92	77	Calendar entry: before Judge SJ on 9/22/92 for conference. Case called. All counsel present. Gov't to file writ of Cert. by 7/23/93; plaintiff will not amend complaint; motion to dismiss by gov't pending before the Court. Plaintiffs makes application for bifurcate

Date	No.	PROCEEDINGS
		trial. Gov't to submit letter brief by 9/24/92; plaintiff to respond by 9/25/92. [Entry date 09/29/92]
		• • • • •

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 96-6144

HAITIAN CTRS COUNCIL, ET AL.

v.

MCNARY, ET AL.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
6/8/92	NOTE: See Related Case: 92-6090(L) . . .
6/8/92	Appellants Haitian Centers Council, Inc., Natl Coalition for Haitian Refugees, Immigration Law Clinic, Frantz Guerrier, Pascal Henry, Lauriton Guneau et al. motion to expedite appeal, FILED.
	* * * * *
6/16/92	Copy of district court docket entries and notice of appeal on behalf of Appellants Haitian Centers Coun, Natl Coalition for H, Immigration Law Clin, Frantz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, Roges Noel, A. Iris Vilnor, Mireille Berger, Yvrose Pierre and Mathieu Noel filed. [92-6144]
	* * * * *
6/18/92	Order FILED GRANTING motion for expedite appeal [290367-1] by Appellant Haitian Centers Coun, Natl Coalition for H, Immigration Law Clin, Frantz Guerrier Dr., Pascal Henry, Lauriton Guneau, endorsed on motion form dated 6/8/92.

DATE	PROCEEDINGS
6/18/92	Expedited scheduling order filed. Record on appeal is due on 6/18/92. Appellant's brief and appendix due on 6/18/92. Appellee's brief is due on 6/24/92. Appellant's reply brief is due on 6/25/92. (Typwritten papers will be accepted) Argument will be heard on 6/26/92. SEE ATTACHED ORDER DATED JUNE 18, 1992
6/18/92	Set for argument on 6/26/92. [92-6144]
	* * * * *
6/18/92	Appellants Haitian Centers Coun, Natl Coalition for H, Immigration Law Clin, Frantz Guerrier, Pascal Henry, Lauriton Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, Roges Noel, A. Iris Vilnor, Mireille Berger, Yvrose Pierre, Mathieu Noel brief FILED with proof of service.
6/24/92	Appellants Haitian Centers Coun, Natl Coalition for H, Immigration Law Clin, Frantz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, Roges Noel, A. Iris Vilnor, Mireille Berger, Yvrose Pierre, Mathieu Noel joint appendix filed w/pfs. Number of volumes: 3.
6/24/92	Set for argument on 6/26/92 [92-6144] (cal)
	* * * * *
6/24/92	Appellees Gene McNary, William P. Barr, INS, James Baker, Rear Admiral Kramek, Admiral Kime brief filed with proof of service.
	* * * * *
6/26/92	Case heard before NEWMAN, PRATT, WALKER, C.JJ. (TAPE: #250-251)
6/26/92	Appellants Haitian Centers Coun, Natl Coalition for H, Immigration Law Clin, Frantz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe,

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DATE	PROCEEDINGS
	Roges Noel, A. Iris Vilnor, Mireille Berger, Yvrose Pierre, Mathieu Noel reply brief filed with proof of service.
7/28/92	Judgment MANDATE ISSUED.
7/29/92	Judgment is reversed and the case is remanded to the district court with instructions to enter an injunction prohibiting the defendants from returning to Haiti any interdicted Haitian whose life or freedom would be threatened on account of his or her race, religion, nationality, membership in a particular social group, or political opinion, by published signed opinion per Judge Pratt. MANDATE SHALL ISSUE FORTHWITH.
7/29/92	Judge Newman concurring in a separate opinion filed.
7/29/92	Judge Walker DISSENTING in a separate opinion filed.
7/29/92	Judgment filed.
7/29/92	Copy of faxed Letter dated July 29, 1992 from attorney Harold Hongju Koh, counsel for Haitian Centers Council, et al., in re: anticipation of a motion to stay of the mandate. (cc: panel)
7/29/92	Faxed copy of Judge Sterling Johnson, Jr., USDJ, order that the defendants are preliminarily enjoined pursuant to Fed. R. Civ. P. 65 from returning to Haiti any interdicted Haitian whoselife or freedom would be threatenedd on account of his or her race, religion, nationality, or political opinion, received
7/30/92	Appellees Gene McNary, William P. Barr, INS, James Baker, Rear Admiral Kramek, Admiral Kime, Commander, U.S. Naval Base, Guantanamo Bay, motion to recall mandate and stay madate pending the filing and disposition of a writ of certiorari in the US Supreme Court, FILED. [304596-1]

DATE	PROCEEDINGS
7/30/92	Letter dated July 30, 1992 from attorney Harold Hongju Koh, counsel for Haitian Centers Council, Inc., et al., and the government's motion to re call mandate, received (cc: panel).
7/30/92	Appellant Haitian Centers Coun et al., affidavit in opposition to the motion of appellees to recall mandate [304596-1] and stay mandate pending pending certiorari, filed.
7/30/92	Order FILED GRANTING motion to recall mandate [304596-1] by Appellee Gene McNary, William P. Barr, INS, James Baker III, Rear Admiral Kramek, Admiral Kime, endorsed on motion form dated 7/30/92. Upon consideration of the motion United States to recall and stay this Court's mandate, it is hereby Ordered that the injunction issued July 29, 1992, by the District Court in conformity with our mandate is stayed for 48 hours to permit the orderely consideration of such further application for a stay as the United States may seek from the Supreme Court or a Justice thereof. Judge Walker would grant the motion for a stay in full.
8/5/92	Order filed stating that the Supreme Court has granted an application for stay and it is ordered that the judgment of the United States Court of Appeals are stayed pending the filing of a petition for a writ of certiorari on or before August 24, 1992.
8/28/92	Notice of filing petition for writ of certiorari for Appellees Gene McNary, INS, et al., dated August 24, 1992 filed. Supreme Ct. #92-344.
10/13/92	Certified copy of Supreme Court order GRANTING petition for writ of certiorari [313006-1] by Appellee Gene McNary, INS, endorsed on motion form dated 8/28/92. dated October 5, 1992.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-92-1258

HAITIAN CENTERS COUNCIL, INC. NATIONAL COALITION FOR HAITIAN REFUGEES, INC., IMMIGRATION LAW CLINIC OF THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION, OF NEW HAVEN, CONNECTICUT; DR. FRANTZ GUERRIER, PASCAL HENRY, LAURITON GUNEAU, MEDILIEU SOREL ST. FLEUR, DIEU RÈNEL, MILOT BAPTISTE, JEAN DOE, and ROGES NOEL on behalf of themselves and all others similarly situated; A. IRIS VILNOR on behalf of herself and all others similarly situated; MIREILLE BERGER, YVROSE PIERRE and MATHIEU NOEL on behalf of themselves and all others similarly situated, PLAINTIFFS

vs.

GENE MCNARY, Commissioner, Immigration and Naturalization Service; WILLIAM P. BARR, Attorney General; IMMIGRATION AND NATURALIZATION SERVICE; JAMES BAKER, III, Secretary of State; REAR ADMIRAL ROBERT KRAMEK and ADMIRAL KIME, COMMANDANTS, United States Coast Guard; and COMMANDER U.S. NAVAL BASE, GUANTANAMO BAY, DEFENDANTS

COMPLAINT

Plaintiffs Haitian Centers Council, Inc., National Coalition for Haitian Refugees, Inc., Immigration Law Clinic of the Jerome N. Frank Legal Services Organization, of New Haven, Connecticut (hereinafter "Haitian Service Organizations"); Dr. Frantz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, and Roges Noel on behalf of themselves and all others similarly situated (hereinafter

"screened in plaintiffs"); A. Iris Vilnor on behalf of herself and all others similarly situated (hereinafter "screened out plaintiffs"); and Mireille Berger, Yvrose Pierre and Mathieu Noel on behalf of themselves and all others similiarly situated (hereinafter "immediate relative plaintiffs"), by their undersigned attorneys, as and for their complaint, allege as follows:

PRELIMINARY STATEMENT

1. This is a complaint for declaratory and injunctive relief arising from defendants' illegal and arbitrary actions against Haitians and Haitian Service Organizations following the military coup that overthrew the government of Jean-Bertrand Aristide on September 30, 1991. Following the coup, many Haitians fled their country because of a well-founded fear of political persecution. Defendants have all but ignored those fears. Although binding domestic and international law mandates that refugees, such as the Haitian plaintiffs in this action, shall not be returned to countries where they face death and political persecution, defendants have interdicted numerous vessels on the high seas carrying the Haitian refugees to freedom. Defendants have detained those refugees at Guantanamo Bay Naval Base and subjected them to screening procedures nowhere mentioned in the Immigration and Nationality Act (INA). Refugees who have been "screened out" are then forcibly repatriated to Haiti to face death, injury or political persecution. Those who have been "screened in" remain detained and uncounseled for the most part, even as they await further proceedings that may lead to their forced repatriation.

2. Although the First Amendment protects the right of lawyers to talk with their clients, defendant officials have barred plaintiff legal and advocacy groups from speaking to Haitian refugees held incommunicado within U.S. jurisdiction, based solely upon the content of the message those representatives would communicate. Defendants

simultaneously have barred plaintiff Haitian refugees from communicating with their retained counsel, even while subjecting those refugees to screening and exclusion proceedings that may lead to their death or serious injury. Since the September coup, lower executive officials have acted arbitrarily and capriciously and in violation of unambiguous constitutional, statutory, presidential, and administrative mandates to coerce and detain plaintiff refugees and to diminish their right to resist forced repatriation to a brutal regime the United States Government has called illegitimate. In so doing, defendants have ignored binding international obligations that have been executed as United States law and which deny them discretion to return political refugees to a country where those refugees have a well-founded fear of political persecution. Finally, defendants impermissibly have applied these unauthorized, *ad hoc* procedures solely against Haitian refugees, based on their race and national origin.

JURISDICTION AND VENUE

3. Plaintiffs' claims arise under the Immigration and Nationality Act, 8 U.S.C. Sections 101(a)(43), 1157(c), 1158, 1182, 1225, 1226, 1253(h), 1362, the Refugee Act of 1980, 8 U.S.C. Section 1521, regulations promulgated thereunder, the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, Executive Order No. 12324 of September 1981, 46 Fed. Reg. 48107, the INS's Interdiction Guidelines and Operations Instructions of October 6, 1981, the First and Fifth Amendments to the United States Constitution, the Agreement Effected by Exchange of Notes Between the United States and the Republic of Haiti of September 23, 1981, the United Nations Protocol Relating to the Status of Refugees, and principles of customary international law. Jurisdiction is based on 28 U.S.C. § 1331, as a civil action arising under the Constitution, laws, or treaties of the United States; 8 U.S.C. § 1329, as a civil action arising under the Immigration and Nationality Act, as amended; 5 U.S.C. § 702 as a civil action arising under the Administrative Procedure Act; and 28 U.S.C. § 2201, 2202 as a civil action seeking, in addition to other remedies, a declaratory judgment.

4. Venue is proper in this district under 28 U.S.C. Section 1391(e)(3) because the defendants include officers and employees of the United States and agencies thereof acting in their official capacity, and because plaintiff Haitian Centers Council, Inc. ("HCC") is a not-for-profit corporation organized and existing under the laws of the State of New York and has its principal place of business in Brooklyn, New York. Individual named plaintiff Yvrose Pierre is a resident of Brooklyn, N.Y. No real property is involved in this action.

PARTIES

A. *Plaintiffs*

5. Plaintiff Haitian Centers Council ("HCC") is a not-for-profit corporation organized and existing under the laws of the State of New York, having its principal place of business at 50 Court Street, Brooklyn, New York. It provides a variety of services to the Haitian community, particularly the refugee community. Its clients have included thousands of Haitian refugees, including many that have fled Haiti by boat. Among its services HCC provides *pro bono* legal counsel on immigration questions for refugees seeking political asylum. HCC also provides services concerning employment, family counseling, job placement, AIDS education and prevention, education and health. It represents all Haitians that need its services, and part of its mission is advocacy on behalf of Haitian refugees. It has sought and continues to seek to provide services, legal and otherwise, to Haitians who have fled Haiti and been interdicted by defendants since the September 1991 coup. Defendants have denied HCC access to its clients on Guantanamo Bay Naval Base, thereby hind-

ering its ability to provide effective representation to its interdicted clients.

6. Plaintiff National Coalition for Haitian Refugees, Inc. ("NCHR") is a not-for-profit corporation organized and existing under the laws of the State of New York, having its principal place of business in New York City. NCHR is comprised of prominent labor, religious, immigrant and refugee organizations. Formed in 1982, NCHR was designed to respond expressly to the plight of refugees fleeing repression in Haiti and seeking new lives in the United States. NCHR monitors and advocates for the rights of Haitians and provides legal and other services to Haitian asylum seekers—its clients—both within and outside the United States. NCHR seeks to represent those clients' interests in this lawsuit. Defendants have denied NCHR access to its clients on Guantanamo Bay Naval Base, thereby hindering its ability to provide effective representation to its interdicted clients.

7. The Immigration Law Clinic of the Jerome N. Frank Legal Services Organization, of New Haven, Connecticut was organized in 1989 at the Yale Law School as a faculty-supervised clinical course to render *pro bono* legal assistance to refugees filing asylum claims. Clinic members currently are counseling Haitian refugees in the United States who previously were detained by defendants at Guantanamo Bay Naval Base or on Coast Guard cutters.

8. The individual named plaintiffs Dr. Franz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste and Roges Noel, on information and belief, are Haitian refugees who have been "screened in" and are being held in detention at Guantanamo Bay Naval Base. They have retained plaintiff Haitian Service Organizations as their counsel. These named plaintiffs also represent other similarly situated persons detained within U.S. jurisdiction on Coast Guard cutters or at Guantanamo Bay Naval Base (the "screened in plaintiffs"). On information and belief, defendants have screened in some

6,000 Haitian detainees as having credible claims for political asylum. Although the "screened in" Haitians were supposed to be brought to the United States and afforded full procedural safeguards, including the right to counsel, many of them have languished at Guantanamo Bay and have not been informed of their screened-in status or of their procedural rights. They seek, and are entitled to seek, political asylum in the United States. They have a substantive right not to be forcibly returned to Haiti, where they face persecutions because of their political opinions and risk unlawful arrest, detention, persecution and possible death. They also seek the enforcement of the U.S. government's obligations under domestic and international law. Plaintiff Haitian Service Organizations consider the above named plaintiffs and similarly situated persons to be clients of their organizations by virtue of their seeking asylum status. These "screened in" Haitians are being detained incommunicado at Guantanamo and denied their right to communicate with retained counsel and/or to communicate with counsel they wish to retain. Contrary to defendants' previous assertions that asylum processing would take place in the United States with lawfully guaranteed procedures, including right to counsel, some of these "screened in" Haitians are being processed for political asylum on Guantanamo.

9. Jean Doe, a Haitian presently detained on Guantanamo, is one of the "screened in" plaintiffs who, along with at least 200 others, is being processed by INS asylum officers for political asylum at Guantanamo. This processing is taking place contrary to defendants' previous assertion that such processing would take place in the United States where plaintiffs would clearly have substantial statutory procedural rights, including the right to counsel. This change in policy and practice occurred on or about March 10, 1992. Despite the fact that he is being processed for political asylum, plaintiff is not being provided with any counsel, any right of rebuttal or any of the

other procedural safeguards required by the Immigration and Nationality Act, regulations and due process. On information and belief, plaintiff wishes to challenge the arbitrary and *ad hoc* procedures which he confronts, and has made a written objection to defendants or their agents regarding the additional tier(s) of screening to which he is being subjected. On information and belief, he has refused to be "rescreened," on the grounds that defendants or their agents promised that he and others similarly situated would be processed for asylum on Guantanamo, and that to be rescreened on Guantanamo deprives him of the right to consult with counsel regarding his rights in such a proceeding. Plaintiff Haitian Service Organizations consider the above-named plaintiff and similarly situated persons to be clients and constituents of Haitian Service Organizations by virtue of their seeking refugee or asylum status. The above-named plaintiff sues under a pseudonym because, on information and belief, he fears retaliation against himself and/or his family for participation in this legal challenge. He sues on behalf of himself and other detainees similarly situated.

10. The individual named plaintiff A. Iris Vilnor is, on information and belief, a Haitian being held in detention on Guantanamo who has been "screened out" by the INS. By being screened out, she will be returned forcibly to Haiti without further proceedings to face likely persecution and possible injury or death. On information and belief, approximately 8,000 Haitian detainees have been screened out by defendants. On information and belief, less than 1,000 now remain at Guantanamo Bay Naval Base. The named plaintiff also represents other similarly situated persons (the "screened out plaintiffs") detained within U.S. jurisdiction on cutters or at Guantanamo Bay Naval Base who seek, and are entitled to seek, political asylum in the United States. The named plaintiff has retained the Haitian Service Organizations as her advocate and legal counsel and represents the interests of

others who have retained legal counsel or who seek to retain such counsel. The plaintiff wishes to consult with her counsel in order to pursue her right to apply for political asylum and to have her legal options explained to her. She has a substantive right not to be forcibly returned to Haiti, where she faces persecution because of her political opinions and the risk of unlawful arrest, detention, persecution and possible death. She also seeks the enforcement of the U.S. government's obligations under domestic and international law. Because of the arbitrary and capricious program instituted by defendants, plaintiff has not had a meaningful opportunity to present her asylum claim. The Haitian Service Organizations consider the above named plaintiff and similarly situated persons to be their clients by virtue of their seeking refugee or asylum status. The intercepted Haitians are entitled to seek effective assistance from the Haitian Service Organizations, and likewise, the Haitian Service Organizations would assist the interdicted Haitians regarding their desires to seek asylum status if so permitted by defendants.

11. Plaintiff Mireille Berger is a lawful permanent resident of the United States living in Brooklyn, New York. She was born in Haiti and is a Haitian citizen. Three of her first cousins are Haitian citizens who presently are being detained on Guantanamo. She sues on her own behalf and on behalf of other Haitians in the United States who have relatives detained on Guantanamo (the "relative plaintiffs"). This plaintiff and the class she represents are being denied their First Amendment associational rights with their detained relatives and their interest in having the United States immigration laws applied to their relatives without discrimination on the basis of national origin.

12. Plaintiff Yvrose Pierre is a lawful permanent resident of the United States living in Brooklyn, New York. Her two daughters, both minors, now aged sixteen and

seventeen, fled from Haiti in November or December 1991, were interdicted by the U.S. Coast Guard and detained by defendants at Guantanamo Bay. The older of the two daughters was forcibly repatriated to Haiti at the end of January. On information and belief, the younger daughter is still being detained on Guanantmo by defendants. This plaintiff and the class the she represents (the "immediate relative plaintiffs") are being denied First Amendment associational rights and their interest in having the United States immigration laws applied without discrimination on the basis of national origin.

13. Plaintiff Mathius Noel is a naturalized citizen of the United States living in Waterford, Connecticut. His brother, aged 27, fled from Haiti in late February, 1992, was interdicted by the U.S. Coast Guard and on information and belief now is being detained at Guantanamo Bay. He sues on his own behalf and on behalf of other Haitians in the United States who have relatives detained on Guantanamo. This plaintiff and the class he represents are being denied First Amendment associational rights and their interest in having the United States immigration laws applied without discrimination on the basis of national origin.

B. Defendants

14. Defendant Gene McNary is the Commissioner of the Immigration and Naturalization Service ("INS"). He is in charge of implementing the practices and procedures under which plaintiffs are denied their statutory and constitutional rights. The INS officers on board the United States Coast Guard cutters and at the U.S. Naval Base at Guantanamo Bay are acting under his direction and supervision. Defendant McNary is being sued in his official capacity.

15. Defendant William P. Barr, III, is the United States Attorney General and in that capacity has ultimate responsibility for the enforcement of the immigration laws

of the United States. Defendant Barr is being sued in his official capacity.

16. Defendant James Baker, III, is the United States Secretary of State and in that capacity has the final decision-making authority within his department. Upon information and belief, the State Department has directed other United States agencies forcibly to repatriate Haitian refugees. Defendant Baker is being sued in his official capacity.

17. Defendants Kramek and Kime are Commandants of the United States Coast Guard. Other Coast Guard officers implementing the interdiction program are acting under their direction and command. These defendants are being sued in their official capacity.

18. Defendant Commander of the United States Naval Base has general jurisdiction over the United States' military operations at Guantanamo.

19. Defendant Immigration and Nationalization Service (INS) is the agency charged with direct responsibility for enforcing the immigration laws of the United States.

STATEMENT OF FACTS

20. On September 30, 1991, a military coup ousted Haitian President Jean-Bertrand Aristide. President Aristide had been elected in December 1990 in the first fully democratic elections to take place in Haiti in over 200 years.

21. The United States government refused to recognize the military junta which succeeded President Aristide. President Bush issued Executive Orders freezing all assets of Haiti in the United States and prohibiting United States citizens from transacting any business with the military junta. In Executive Order 12779, the President recognized that "the grave events in the Republic of Haiti . . . are continuing to disrupt the legitimate exercise of power by the democratically elected government of that country."

22. The September 1991 coup triggered a continuing, widely publicized reign of terror in Haiti. On information and belief, in the past five months, over fifteen hundred Haitians, many of them supporters of the Aristide government have been killed or subjected to violence and destruction of their property because of their political beliefs and affiliations, producing fear and desperation throughout the country.

23. As a result of these grave conditions, thousands of Haitians have fled the brutality of the illegal Haitian regime. Thousands of refugees have fled to the Dominican Republic. Thousands more have set out in small boats that are often overloaded, unseaworthy, lacking basic safety equipment, and operated by inexperienced persons, braving the hazards of a prolonged journey over high seas in search of safety and freedom.

24. United States Coast Guard cutters on patrol in the international waters of the Windward Passage near Haiti have intercepted and are intercepting vessels carrying Haitians fleeing political persecution, many of whom have no desire to enter the United States and either have no specific destination in mind or are fleeing to a particular third country.

25. To date, countless vessels carrying Haitian refugees have been intercepted and more than 16,000 Haitians from these vessels have been detained since the coup. Initially, interdicted Haitians were taken to Guantanamo, where after being denied procedural safeguards, including the right to counsel, the Haitian detainees were interviewed summarily and classified as "screened in" or "screened out." The "screened out" detainees thereby lost any opportunity to demonstrate that they were political refugees who should not be forcibly returned to Haiti because of a well-founded fear of persecution. The "screened in" detainees were supposed to be brought to the United States and afforded the full panoply of procedural safeguards in asserting their political asylum

claims, including the right to counsel, although only a small number have apparently been so treated.

26. Well over 14,000 Haitians have been taken to the United States Naval Base at Guantanamo Bay, where they have been detained incommunicado week after week. Guantanamo Naval Base and the Coast Guard cutters on which the Haitians were originally detained are wholly within the jurisdiction of the United States.

27. Despite repeated attempts by legal and advocacy groups to gain access to Haitian refugees on the Coast Guard cutters or at Guantanamo Bay, defendants have barred such access completely. At the same time, however, defendants have granted access to numerous other individuals, including clergy and church groups, the press, and even piano-tuners.

28. Although the forcible repatriation of the "screened out" Haitian detainees was for a period preliminarily enjoined by the United States District Court for the Southern District of Florida, the United States Court of Appeals for the Eleventh Circuit ultimately vacated all injunctions on February 4, 1992. On February 26, 1992, the Supreme Court denied certiorari, permitting the forcible repatriation of the "screened out" Haitian detainees to continue unchecked.

29. After the Supreme Court's denial of certiorari, defendants changed their screening policy by resuming screening on Coast Guard cutters and forcing some "screened in" Haitian refugees to undergo multiple layers of review before being brought to the United States. At present, defendants are purporting to adjudicate fully some Haitians' political asylum claims on Guantanamo while denying them access to counsel, the opportunity to rebut and submit evidence and other procedural safeguards. As a direct result of these procedural changes, the percentage of Haitians "screened in" has dropped precipitously. Defendants have provided no public notice in the Federal Register or otherwise to

plaintiff Haitian Service Organizations, to plaintiff Haitan refugees, or to any one else in the United States or elsewhere of these drastic changes in procedure that directly affect the life and liberty of plaintiff Haitian refugees and that continue to thwart the organizational purposes of plaintiff Haitian Service Organizations.

IMMEDIATE EVENTS GIVING RISE TO THIS LAWSUIT

30. With the removal of judicial oversight, defendants have resumed their total ban on the access of legal advocacy organizations to Haitian refugees being held incommunicado on Guantanamo or the cutters.

31. On March 11, 1992, plaintiffs' counsel wrote defendant McNary and the Commanding Officer of the U.S. Naval Air Station, Guantanamo Bay, requesting access on behalf of plaintiff Haitian Service Organizations to Haitian citizens currently being held at the United States Naval Base on Guantanamo Bay and on Coast Guard cutters off Guantanamo, for the purpose of providing them legal counsel, advocacy, and representation. In particular, plaintiffs' counsel requested access to communicate with named plaintiffs Dr. Frantz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, A. Iris Vilnor and with the leaders of the organization known as the Association of Haitian Political Exiles. Plaintiffs' counsel requested that plaintiff Haitian Service Organizations be given immedate access to these Haitian individuals on such terms and conditions as might be reasonable to the Government, before 9 a.m. Monday, March 16, 1992. As of that date and time, no response has been received by plaintiffs' counsel. On information and belief, defendants have denied the requests of all legal and advocacy groups seeking such access.

32. During this same period, defendants have denied detained refugees any rights to obtain or communicate with counsel regarding their legal rights and options.

33. Defendant INS has altered substantive rules which have a substantial impact on the individuals regulated without following the rulemaking procedures set out in the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, thus rendering them void. These altered substantive rules include, but are not limited to, rescreening of Guantanamo refugees already "screened in"; forcing such refugees into asylum proceedings on Guantanamo; and interviewing Haitian refugees on cutters.

34. Since the September coup, defendants have engaged in a pattern and practice of intimidating and coercing plaintiffs, of discouraging and diminishing their rights to asylum and to alternative-country placement, and of wilfully relying upon false information and prejudicial biases to effect forced repatriations. These practices include, but are not limited to:

a. Barring plaintiff "screened in" Haitian refugees who have been or will be screened again from communicating with counsel, while forcing them to undergo multiple tiers of screening, including, on information and belief, final adjudication of their political asylum claims on Guantanamo itself.

b. On information and belief, when defendants determined that improved screening procedures had raised the rate of Haitian refugees being "screened in," defendants, including officers of the State Department, developed new policies and new instructions for INS screening personnel, directing that fewer Haitians be "screened in" or deemed to have credible asylum claims. This directive was given without reference to the particular circumstances of any individual cases; defendant INS simply made known that the State Department and/or various Executive officers desired to see fewer asylum applicants from Haiti "screened in."

c. Defendant Immigration and Naturalization Service continues to rely on inaccurate and misleading State Department reports regarding the situation in Haiti.

d. On information and belief, defendant INS has urged greater reliance by its officials on State Department reports in preference to the reports of internationally-recognized Human Rights agencies.

e. On information and belief, defendant State Department has issued a directive to defendant Immigration and Naturalization Service instructing such defendants to include factors in their asylum determinations that are contrary to law.

f. United States officials have declared that all Haitian detainees on Guantanamo who have been "screened in" would be sent expeditiously to the United States for adjudication of their claims to asylum. As the defendants have represented in prior litigation:

> Under current practice, any aliens who satisfy the threshold standard *are to be brought to the United States so that they can file an application for asylum* under Section 208.02 of the Immigration and Nationality Act (INA), 80 SL § 118(a). These 'screened in' individuals then have the opportunity for a *full adjudicatory determination* of whether they satisfy the statutory standard of being a 'refugee' and otherwise qualify for the discretionary relief of asylum.

Op. Cert., *HRC v. Baker*, at 3. In direct contradiction to these public assurances of United States officials, following the end of judicial oversight, on February 29, 1992, Grover Joseph Rees, General Counsel of the INS, circulated a memo-

randum setting forth agency policy *not* to bring all "screened in" plaintiffs to the U.S., but to send additional INS asylum officers to Guantanamo in order to adjudicate the asylum claims of some Haitians who already have been "screened in." This adjudication is being carried out without counsel or any other procedural protections.

g. As of March 10, 1992, approximately 20 asylum officers were at Guantanamo Bay Naval Base. On information and belief, additional asylum officers are on their way or have already arrived at Guantanamo. These asylum officers have already begun to decide asylum claims of some of the "screened in" Haitians. The INS intends to treat the decisions of asylum officers as final and binding, resulting in either asylee/refugee status or immediate forcible repatriation for the plaintiff Haitians whose claims they decide.

h. Defendants have sought to discourage plaintiffs from pursuing their lawful asylum claims by publishing false and misleading stories in the Guantanamo camp newspaper suggesting that plaintiffs' chances for asylum are remote and implying that conditions in Haiti are now safe.

i. Defendants ask questions of Haitian plaintiffs that are designed to confuse and trick them, and to inhibit them from raising their valid claims to asylum. Defendants are additionally ignoring evidence that might support plaintiffs' claims.

35. Defendant officials intentionally have created and operated, because of the national origin and race of plaintiff Haitian refugees, an unauthorized, separate and unequal asylum track for Haitians only, which denies Haitian refugees the equal protection of the law, to wit: the substantive and procedural rights enjoyed by asylum

applicants of other racial and national groups; and the associational rights of the refugees' family members.

CLASS ACTION ALLEGATIONS

36. The named Haitian plaintiffs bring this action pursuant to Rule 23(a) and (b)(1)(2) on behalf of themselves and all other persons similarly situated in the following presently ascertainable classes:

37. All Haitian refugees who previously have been "screened in" and are now detained on Guantanamo, including those who may face or who have faced additional screening procedures, including but not limited to, those whose political asylum status defendants are purporting to adjudicate fully on Guantanamo, without right to counsel or other protections as required by law (hereinafter "screened in plaintiffs"). On information and belief, this group currently number over 6,000.

38. All Haitian refugees who have retained plaintiff Haitian Service Organizations as counsel, who may retain plaintiff organizations as counsel in the future, or who have the right to obtain assistance of counsel from other persons (hereinafter "Haitian Service Organization clients"). On information and belief, this group currently numbers over 6,000.

39. All Haitian refugees who are awaiting screening or have been "screened out" and currently are awaiting forcible repatriation, while being detained within territory subject to U.S. jurisdiction, whether on Coast Guard cutters, on Guantanamo Bay Naval Base, or outside the continental U.S. (hereinafter "screened out plaintiffs"). On information and belief, this group currently numbers approximately 200.

40. All fathers, mothers, sons, daughters, siblings, counsins and close relatives of members of any of the above classes who have been deprived of their rights to associate with their relatives because of defendants' actions (hereinafter "immediate relative plaintiffs"). On

information and belief, this group currently numbers over 1,000.

41. Plaintiff classes warrant class action treatment because; they are sufficiently numerous; defendants have acted or threatened to act on grounds generally applicable to each member of each class, thus making final declaratory and injunctive relief with respect to each class as a whole appropriate; the plaintiffs are adequate representatives of their classes and the claims of the named plaintiffs are both common to and typical of the claims of members of each class.

FIRST CLAIM FOR RELIEF

(Content-Based Denial of First Amendment Rights)

42. Plaintiffs repeat, reallege and incorporate paragraphs 1 through 41 above as though fully set forth herein.

43. Plaintiff Haitian Service Organizations are legal and advocacy groups formed for the organizational purpose of providing counseling, advocacy, and legal representation, without remuneration, to refugees, including Haitian refugees.

44. In furtherance of their organizational purposes, plaintiff Haitian Service Organizations seek to communicate with Haitian citizens, including the individual named plaintiffs, who are held at the United States Naval Base on Guantanamo Bay, and on Coast Guard cutters off Guantanamo, and elsewhere, for the purpose of providing them legal counsel, advocacy, and representation.

45. Defendants' refusal to allow plaintiff Haitian Service Organizations to have access to communicate with Haitian refugees being detained by the U.S. government at the U.S. Naval Base at Guantanamo Bay on Coast Guard cutters and elsewhere, denies plaintiffs' First Amendment rights. Defendants' allowing other individuals and organizations who are not competent to counsel plaintiff Haitian refugees on their asylum claims to gain

access to those refugees, is a content-based restriction on the free speech and association rights of plaintiff Haitian Service Organizations and therefore violates plaintiffs' rights under the First Amendment of the U.S. Constitution.

SECOND CLAIM FOR RELIEF

(Denial of Statutory Rights
to Obtain and Communicate with Counsel)

46. Plaintiffs repeat and reallege paragraphs 1 through 45 as though fully set forth herein.

47. Defendants have stopped, forcibly detained, and involuntarily transported the Haitian plaintiffs to Guantanamo Bay Naval Base, territory subject to U.S. jurisdiction and over which the United States exercises full jurisdiction and control in perpetuity. Defendants' actions constitute "inspections" for purposes of § 235 of the INA.

48. By detaining, interrogating, and "screening" Haitian plaintiffs, immigration officers have placed plaintiffs into the legal status of persons entitled to full exclusion proceedings as defined in §§ 235 and 236 of the INA. 8 U.S.C. §§ 1225, 1226.

49. Defendants' denial of Haitian plaintiffs' rights and the rights of the classes they represent to obtain counsel or to communicate with retained counsel in pursuing their claim for political asylum or in their exclusion proceedings violates plaintiffs' rights under INA § 292 8 U.S.C. § 1362.

50. Defendants' failure to notify Haitian plaintiffs of their statutory rights, including their right to obtain counsel or to communicate with counsel during screening, violates 8 C.F.R. § 242.1(c) (1990), requiring immigration officers to notify aliens of their right to counsel and the availability of free legal services programs. 8 C.F.R. § 242.1(c) (1990).

51. The determination at Guantanamo Bay Naval Base of plaintiff Haitians' asylum claims by INS asylum officers

violates plaintiffs' right to submit documentation, testimony, and affidavits of witnesses, as well as their right to counsel, as provided in INS agency regulations. 8 C.F.R. § 208.9 (1990), and Agency operating guidelines. INS Procedure Manual, at 17-19.

52. Defendants' intention to repatriate plaintiff "screened in" Haitians following the negative determination of their asylum claims by INS asylum officers violates plaintiffs' right to have 30 days to present affidavits of witnesses and additional evidence to rebut the denial of an asylum claim. INS Draft O.I. 208.12(a) (1991).

THIRD CLAIM FOR RELIEF

(Denial of Constitutional Rights
to Obtain and Communicate with Counsel)

53. Plaintiffs repeat and reallege paragraphs 1 through 52 as though fully set forth herein.

54. Defendants' denial of Haitian plaintiffs' rights and the rights of the class whom they represent to obtain counsel or to communicate with retained counsel in pursuing their claims for political asylum or in their exclusion proceedings violates the First and Fifth Amendment rights of Haitians plaintiff on Guantanamo to obtain counsel and to communicate with retained counsel.

FOURTH CLAIM FOR RELIEF

(Failure to Follow Rulemaking Procedures)

55. Plaintiffs repeat and reallege paragraphs 1 through 54 as if fully set forth herein.

56. The policies and practices recently initiated by the INS constitute substantive rules that have a substantial impact on the individuals regulated, on their family members lawfully in this country, on their legal representatives and political advocates, and on the general public.

57. Defendants' failure to publish these policy changes in the Federal Register and allow for notice and comment violates the rulemaking procedures set out in the

Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, and renders them void.

FIFTH CLAIM FOR RELIEF

(Arbitrary and Capricious Agency Action Not in Accordance With Law)

58. Plaintiffs repeat and reallege paragraphs 1 through 57 as though fully set forth herein.

59. Defendants' pattern and practice of intimidating and coercing plaintiffs, of discouraging and diminishing their rights to asylum and to alternative-country placement, and of wilfully relying upon false information and prejudicial biases to effect forced repatriations and to deny individual asylum claims on their merits are arbitrary and capricious, an abuse of discretion, not in accordance with law, and reviewable by this court under the Administrative Procedure Act, 5 U.S.C. Sec. 701 *et seq.*

SIXTH CLAIM FOR RELIEF

(Judicial Enforceability of Duty of Non-Refoulement)

60. Plaintiff Haitian refugees repeat and reallege paragraphs 1 through 59 as if fully set forth herein.

61. Defendant executive officials have a mandatory duty under domestic and international law not to return political refugees to a country where they will face persecution, and to provide adequate procedures to examine colorable asylum claims.

62. Defendants' duties are imposed by all treaties, domestic law, and executive directives that govern the Haitian interdiction program, including Article 33 of the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951), the Refugee Act of 1980, Pub. Law. No. 96-212, 94 Stat. 102 (1980), the Immigration and Nationality Act, 8 U.S.C. § 1253(h), Executive Order 12324, the U.S.-Haiti Agreement, Agreement Effected by Exchange of Notes, signed

at Port-au-Prince September 23, 1981, and the INS guidelines, INS Role in and Guidelines for Interdiction at Sea, Oct. 6, 1981.

63. Plaintiffs may secure judicial enforcement by injunction and declaratory judgment of those executive directives, statutes, and international agreements that execute our international obligations into domestic law.

SEVENTH CLAIM FOR RELIEF

(Equal Protection)

64. Plaintiffs repeat and reallege paragraphs 1 through 63 as though fully set forth herein.

65. Since the September 1991 coup, defendant officials have denied plaintiffs the equal protection of the laws by creating and operating an unauthorized, separate and unequal, asylum track for Haitians only. This second-class asylum regime denies both "screened in" and "screened out" Haitian refugees the substantive and procedural rights enjoyed by asylum applicants from other racial and national groups, injures the associational rights of the refugees' family members, and violates the intent of Congress, whose power is plenary in the immigration field.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and the members of the classes they represent pray for declaratory and injunctive relief as follows:

(a) Certification of each class;

(b) A declaratory judgment that the defendants' practices alleged above violate the terms of Executive Order 12324, the guidelines promulgated pursuant to the Executive Order, the interdiction agreement betwen the United States and Haiti, the Refugee Act of 1980, the Immigration and Nationality Act Sections 101(a)(43), 208 and 243(h), the Administrative Procedure Act, the United Nations Protocol Relating to Status of Refugees, the

First and Fifth Amendments to the United States Constitution, customary international law, and other provisions of law;

(c) A declaratory judgment that the defendants' changes in practice violate the rulemaking requirements of the Administrative Procedure Act, and further declaring the actions taken or determinations made pursuant to defendants' recently instituted policies to be void;

(d) Setting aside the denial of asylum claims or the agency action "screening out" members of the plaintiffs' class as being arbitrary and capricious, not in accordance with law, and not in accordance with procedural requirements;

(e) Preliminary and permanent injunctive relief:

(i) Granting immediate access to plaintiff Haitian Service Organizations, their attorneys, employees, and members, to communicate with the Haitian plaintiffs detained at the Guantanamo Bay Naval Base and on Coast Guard cutters in order to advise these plaintiffs of their legal rights and options in the asylum process, as well as of the Organizations' interest in providing representation and assistance to them in furtherance of organizational goals;

(ii) Ordering defendants to ensure that plaintiff refugees are accorded their statutory and constitutional rights to communicate with counsel, so that they may have a full and fair opportunity to present the merits of their political asylum claims and to obtain advice about their legal options; and to render fair and regular determination of plaintiffs' asylum claims free from caprice and discrimination;

(iii) To refrain from sending back to Haiti those Haitians who have not been "screened in" as candidates for asylum until such time as procedures are implemented and followed which adequately protect and recognize the rights of these persons under the Executive Order, the INS guidelines promulgated pursuant thereto, the APA,

and international law, as well as the privileges ordinarily afforded potential asylum applicants under the Refugee Act of 1980 and the Immigration and Nationality Act;

(iv) Ordering defendants to cease and desist immediately from conducting interviewing, screening, exclusion proceedings or asylum hearings on Guantanamo and to transport all "screened in" plaintiffs expeditiously to the United States so that they may be accorded asylum hearings with the full panoply of statutory rights.

(v) Ordering defendants to refrain from taking any action pursuant to policies instituted in violation of the rulemaking requirements of the Administrative Procedure Act unless and until such policies are properly promulgated pursuant to the A.P.A. and restoring all rights and privileges that plaintiffs and the classes named herein may have been denied while these policies were in effect;

(f) Such other and further relief as the Court may deem just and proper, including reasonable attorneys' fees and costs.

Respectfully submitted,

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PLAINTIFFS' EXHIBIT NO. 28

STATEMENT OF LUMA DUKENS
A71-893-957

I have fled Haiti twice. I fled in November 1991 after the coup because the military had attacked many of those that belonged to the same peasant organization that I belonged to. I was returned to Haiti by the Coast Guard on November 20, 1991. After being returned, I was attacked and beaten by the military as an example to others who may want to flee. After being released I hid in the countryside and fled Haiti again on December 02, 1991. I was brought to the United States in mid-January from Guantanamo.

I was born in Bazin, Acul du Nord, Haiti. I attended school but have very little formal education. After school I worked as a fisherman and farmer in Bazin. When Jean Bertrand Aristide was elected President of Haiti I joined the Mouvement Peyizan Papaye ("MPP"). The leader of MPP in Port-au-Prince was * * * The leader, and my boss, in my area was * * *. We met often where we could speak freely. Through MPP we worked together to keep the community clean, build restrooms, provide literacy programs for children, and formed a treasury for those who fell ill. During the months President Aristide was in power, we told the Tonton Macoutes we would welcome them if they would change.

Immediately after the coup, I was involved in a large demonstration in Bazin. We were in the streets screaming "Give us our President Back" and "We won't let this happen again" and "Macoutes give us a chance." There were so many in the streets I would have been unable to count them all. While we were in the streets we heard on the Radio that people were being shot in the streets. The Radio station told us to stay off the streets. We all fled the streets. After we fled, I know that the military came and arrested some of the MPP members. These people

disappeared. Because of this treatment we couldn't bring the sick and injured to the hospital because we would have been caught. We refused to attend church for regular services or hold baptisms or weddings because the military would have come and arrested us. The military was working to track us down so I went into hiding in the bush.

While I was hiding from the military, who were running after us, I broke my leg. This was on the day after the coup, I believe. I could hear the soldiers shooting at us. Because no one could take me to the hospital for fear they would be caught, I could not get medical attention. And my family was too scared that I could be killed if they took me to a hospital for my broken leg. After some time in the bush, a group of us decided to leave. There were about 115 of us on our boat. Some friends carried me to a boat and we sailed away from Haiti. After a short time we were picked up by the Coast Guard.

I was held on the Coast guard boat and asked questions about why I left Haiti. They didn't spend much time questioning me. They didn't ask me the important questions I wanted to address. The people questioning me didn't identify themselves. There was a white person doing the interviewing and a Haitian doing the interpreting. I was afraid during the interview because they didn't ask me those important questions and I was afraid they were going to return me to Haiti. They asked me about my house, where I lived, my mother's name, where she lived, where I was born, that kind of thing, and then why I left Haiti. To the question why did I leave Haiti, I said I left Haiti because of political problems. I told them how dangerous it was for people like me there in Haiti and how my leg got broken fleeing from the military. I wanted to tell them more details, for example about what political groups I was a member of and why politics caused me to leave Haiti and why I was not able to go back now.

I was cut off by this man interviewing me or by the Haitian interpreter, I don't recall which, from telling these things. Before the interview I had not had much to eat and I was weak and not feeling well. I was also tired and my leg was hurting. I was only taken off the Coast Guard boat to have a cast put on my broken leg. I was then returned to Haiti.

At Port-au-Prince upon my return I was asked questions by the Red Cross and given $10 for bus fare. The Red Cross also made me sign something but they didn't tell me what I was signing so I don't know. Because I had a broken leg, a Red Cross van drove me from the boat terminal in Port-au-Prince to a bus station. Because I had a broken leg when I was sent back to Haiti, I don't know what happend to the others sent back with me, because I didn't go the same route as the others.

When I was in the Red Cross van, before the van started moving from the dock area, a group of soldiers was lined up outside the van. They sent one of the soldiers to the van and he asked me a number of questions. The van at that point wasn't too far from the greeting point on the dock. The soldier asked me for my mother's name, my father's name and where I lived, my age and how I broke my leg. I lied about how I broke my leg, told the soldier that it happened before the coup, but I told him the truth about the other questions because I didn't know whether they returned me to Haiti with my file (which had my real name, address etc). I was afraid and felt the situation when we got off the Coast Guard boat didn't make sense because I was photographed many times when I got off the Coast Guard boat in Haiti at the port. And I didn't know who were the photographers, whether they were the Tonton Macoutes or the government. I think maybe some journalists took pictures of us too, when we got off the boat but I was afraid of the Macoutes taking my picture, not of the journalists. I was afraid the Macoutes were taking my picture because once they knew

I was in the struggle they would come to my house to kill me. Once they have my picture they can recognize me and know I was in the struggle.

The Red Cross then dropped me off at the bus station. Because I would have needed $18 to travel to my family's house in Cap Haitian and the Red Cross only gave me $10, I could only travel to my cousin's house in Cite Soleil where he gave me food and money. So after I ate at my cousin's house, on the day I was sent back to Haiti, on November 20 or 21, 1991 I left my cousin's house on foot to get transportation to get to my mother's home in Bazin which is in Cap Haitien. But shortly after I left my cousin's house, I was stopped by a group of soldiers. This was still in Cite Soleil. I hadn't walked very far because my leg was in a cast, I was limping. These soldiers who stopped me were in blue uniforms and they were carrying guns, small pistols were attached to their belts and some had long guns too. I think maybe they belong to a section of the military called the Cafeteria. These soldiers asked me who I supported in the election. I lied and told them that I had supported Marc Bazin. Then they asked me why I left Haiti. I lied again and told them that Lavalas members had broken my leg. They did not believe me. They made me walk on my broken leg to a house where they detained me. I don't know if there was anyone else who saw the soldiers questioning me, I was so anxious I don't remember.

The house where the soldiers took me wasn't too far from where they questioned me. It was in Cite Soleil. Besides me, I only saw soldiers in this house.

Once I was in this house, the soldiers ordered me to lie flat on the floor, on my stomach. Then they hit me with a stick on my behind on my left side, the same side as my broken leg. They hit me I'm sure at least fifteen times. But I never changed my story.

I was out of myself with pain, from the beating. The soldiers were saying to me "you're going to have to tell

us the truth." I knew if I told them the truth about my political involvement I would be killed. I pretended I didn't know anything about Lavalas, that I hated that group. The soldiers kept me in that house for a while, long enough to beat me.

After they beat me, before the soldiers let me go, they told me that they could hurt me more but would not because they wanted people to see me and for me to tell others what can happen to Haitians who take boats and leave Haiti. They told me that they want me to be an example to others so they do not try to escape Haiti. One soldier told me "those of you who are leaving, you are causing trouble to Haiti." The soldiers told me that people like me who are risking their lives to leave the country by boat are making more problems for the country, particularly people like me with a broken leg, and that we were carrying misleading reports about Haiti. The soldier told me that the military was willing to counter these people with measures, that people who left the country like me could be arrested, beaten, killed and their bodies disposed of outside of anybody's awareness. The soldiers also said about the Haitians who left by boat, "You people have weapons and you're part of a group of Macoutes that Aristide hired, the same way Duvalier had." But we don't have weapons and all we want is fairness and justice and no more terrorizing of the people.

These soldiers may have followed me from the dock to my cousin's house, I don't know. I wouldn't be able to recognize the soldiers in Haiti because you don't look at soldiers straight in the face in Haiti.

After I was released from the house the soldiers made me go to, I used some of the money my cousin gave me to go to Gonaives and then on to Cap Haitien. Actually, after I left the soldiers' house someone gave me a ride to the bus station. The person who gave me a ride to the bus station waved at me, I guess because he saw me limping, and asked where I was going. But he waved at

me so that's why I was less hesitant to let him give me a ride. And I was having trouble walking and wanted to get out of the area with the soldiers who'd just beat me. I think he was probably sympathetic to the people's movement because he tried to help me, but I was afraid to talk to him about what had happened to me since I didn't know whether he was a good samaritan or not. I thought too he might have been a journaiist because we trust the journalists, they've helped us before. It cost me $6 to go to Gonaives and then another $6 to go to Cap Haitien.

When I arrived in Cap Haitien, my mother and the people in my neighborhood told me that I could not go home because the military had been by my home regularly to try to find me. Some people saw me after I had been beaten by the soldiers in Haiti. For example, * * * members of my group in hiding with me, saw how I had been beaten. So my friends hid me in the countryside and would come to check on me. I was in hiding with * * * we had supported in the elections, from the * * *. I knew him because I voted for him and we voted out * * *. He was on the same boat with me when I left Haiti a second time after the coup.

I stayed in hiding with * * * and my mother would sometimes visit me at night to sneak me food. She told me on one of her visits that the military had searched my house and told me to leave Haiti and never to return while these military people were there. My mother was very upset. At this point my friends found me another boat and I fled again on December 2, 1991. On December 3, 1991 I was picked up by the Coast Guard.

This time I was taken to Guantanamo where I explained that this was the second time that I had fled Haiti. I was very scared and shaken up since this was the second time; I was afraid that I would be sent back automatically, since immigration officials did not believe me the first time I left Haiti.

But the second time I was interviewed after leaving my country I was asked many more questions and I had the opportunity to say much more about why I left Haiti again. I didn't get interviewed the same day the Coast Guard picked us up. I know I had slept and showered before they questioned me. Also I was questioned not on the boat, but on land.

But at the time of my interview I was still very worried because I knew what had happened the first time and they still sent me back to Haiti and I was afraid they would do that again and I knew that my photographs had been seen in Haiti and that I would die if they sent me back. But this time it was a much, much, much longer interview. And when I was interviewed I told the persons questioning me what happened when I was returned to Haiti and how they were angry with people like me who had left the country. I was asked important questions about what happened to me after I was returned to Haiti and I had time to tell my story. That made me think of Haiti and to appreciate democracy a little more. And I was questioned more than once about what happened to me when I was returned to Haiti, even the soldiers were asking me questions.

A friend that I met at the hospital on Guantanamo, Pierre, gave me a newspaper article where I was pictured being carried by two individuals back to the Haitian authorities, this was when I was first sent back to Haiti after the coup [New York Times article, 11/21/91]. But some in the military at Guantanamo didn't seem to want the information I was giving. For example, when I received the newspaper with my picture I wanted to give it to the Immigration. But there was a military officer, a Major I think, in charge of the camp who grabbed the newspaper photo away from me and placed me in a small uncovered detention pen behind barbed wire. The major told me my signature was on this paper and I couldn't have it. I was out in the sun for about 3 hours until

the Major came back and touched my head to see how hot I was. When he realized how hot I was he released me.

I had family members who were also in Guantanamo but I wasn't allowed to go to see them. I thought I wasn't allowed visiting rights by the military because they had the photograph of me in the newspaper and they knew I wanted to send the photo and letter to Immigration. I had written a letter in French to give to Immigration and handed it to a reporter so they would take it to Immigration. I made sure no soldiers saw me when I did that. I was afraid of the soldiers for two reasons: (1) I was obsessed with seeing soldiers in Haiti and that brings you lots of fear and terror because you feel like you are about to live through the same thing again and (2) I thought they would turn me back to Haiti again.

Right now, I have three cousins, who were in the MPP with me, hiding in the countryside in Haiti because they are afraid they will be killed by the military. I am certain that if I am returned to Haiti again, I will be recognized and killed. I would rather take my own life than be returned to a certain death.

There is no safe area in Haiti for me to return to. I was photographed several times after my return in Port-au-Prince and I'm sure I'd be killed.

It wasn't my idea to come back here, to leave Haiti, but because I was sent back to Haiti the first time, I had to leave again. I was looking to go to some area like Cuba. All of this is because I'm afraid I'll be killed in Haiti. As long as we have the kind of regime we have in Haiti now I can't go back. The army would have to be under control and the constitutional rights of the people respected.

I wasn't involved in politics before Aristide. Only during Aristide's time I saw what benefit people could have with government, then I got involved.

I am going to school full time now in Miami, to learn English. I love school. I go to classes at the Notre Dame Church here. My teacher is Roger. I really want to learn. If you don't go to school you can do drugs and bad things and I don't want that.

I hereby swear under penalty of perjury that the foregoing is true and correct.

/s/ Luma Dukens
LUMA DUKENS

SWORN TO AND SUBSCRIBED BEFORE ME on this 23rd day of March, 1992.

/s/ [Illegible]
Notary Public

PLAINTIFFS' EXHIBIT NO. 60

U.S. DEPARTMENT OF JUSTICE

Immigration and Naturalization Service
425 Eye Street, N.W.
Washington, D.C. 20536

Feb. 27, 1992

Robert D. Evans, Esq.
American Bar Association
Director, Governmental Affairs Office
1800 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Evans:

Thank you for your letter to Attorney General William Barr suggesting that temporary protected status be extended to nationals of Haiti who are now within the United States. You also expressed concern for the welfare of those seeking to enter the United States in order to flee the strife in Haiti. Your letter has been referred to my office for response.

As you note, a temporary protected status designation for Haiti would not affect Haitians not already admitted to the United States, including those now aboard Coast Guard cutters or at the Navy base in Guantanamo Bay. Congress admonished in section 244A(c)(5) of the Immigration and Nationality Act that section 244A must not "be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for temporary protected status."

You recommend, however, that the Attorney General extend temporary protected status to Haitian nationals already within the United States. Your letter suggests that, because El Salvador, Kuwait, Liberia, Lebanon, and Somalia have been designated within the Temporary Protected Status program, such a designation is also appro-

priate for Haiti. Temporary protected status, however, is not a remedy designed to address every problem, or even every danger. Rather, it is designed for ongoing armed conflicts, natural disasters, and extraordinary and temporary conditions of such nature and magnitude as to make it *generally* impossible to return to a country in safety. Although reasonable people may differ about whether such conditions exist in a given place and time, the designation of each country to which you refer in your letter was made for reasons that have not been found to exist in Haiti.

Congress itself designated El Salvador in section 303 of the Immigration Act of 1990. The Attorney General extended temporary protected status to nationals of Kuwait, Liberia, and Lebanon in response to conditions in those countries and the "strong urging" of a House-Senate Conference Committee. Safe return to Kuwait was impeded by the Iraqi occupation and the subsequent military conflict. Liberia has been ravaged by a civil war that has left tens of thousands dead and has driven approximately 600,000 to flee the country. Large parts of Lebanon lie outside government control, and civilians continue to fall victim to artillery and aerial attacks, bombings, sniping, abductions, summary executions, and assassinations. Though not specifically recommended by Congress, the designation of Somalia followed severe and worsening strife in that country as a result of its civil war. Since January of 1991, the violence that began in Mogadishu has spread throughout Somalia, leaving approximately 20,000 dead. Most foreign embassies there, including that of the United States, have closed.

Conditions in Haiti, though serious enough to warrant all appropriate assistance from the United States, have not been found to warrant temporary protected status. The Attorney General is required by law to consult with other appropriate agencies before making temporary protected status designations. Since the September 30, 1991 coup, the Department of Justice has consulted frequently

with the Department of State about conditions in Haiti. State Department personnel, both in the United States and at the embassy in Port-au-Prince, have attempted to stay abreast of events in Haiti, and particularly to investigate any reports of persecution that might be relevant to the question whether people can be returned safely to Haiti. The information provided by the Department of State indicates that those persons who are not refugees can be returned to Haiti in safety. Since the coup, there have been no substantiated reports that persons returned to Haiti by the United States have been persecuted by Haitian authorities. United States Embassy officials have tried and failed to produce confirmation of reports to the contrary. In fact, conditions may be improving. On February 24, 1992, exiled President Jean-Bertrand Aristide and his Prime Minister-designate Rene Theodore agreed to a political plan to restore an elected government and to arrange for the President's return to Haiti.

After careful and continuing consideration of this evidence, the Attorney General has concluded that conditions in Haiti do not prevent the safe return of persons who are not refugees. Under such circumstances, section 244A does not permit a designation of temporary protected status. Of course, should conditions in Haiti change materially, or should there appear new material evidence of current conditions in Haiti, the Attorney General would consider such changed circumstances or new evidence as appropriate.

Unlike the Temporary Protected Status program, however, the asylum process is designed to protect those people who, for reasons peculiar to themselves or to defined groups of which they are members, cannot be returned to their home country in safety. The United States has acted diligently to ensure that this benefit is provided to every eligible Haitian. All persons rescued on the high seas by United States authorities are afforded an asylum pre-screening interview designed to identify those who

have a credible fear of returning to Haiti because of a serious danger or threat of harm on account of race, religion, nationality, membership in a particular social group, or political opinion. The proof necessary to establish a credible fear of returning is considerably less than that necessary to establish refugee status. Only those who fail to make this minimal showing are returned to Haiti. Those who establish a credible fear of returning—a group numbering in the thousands so far—are eligible for transfer to the United States to pursue thier asylum claims. The credible fear test ensures that no genuine refugee will be involuntarily returned to Haiti.

I hope that this information will reassure you that Haitian nationals within this country and those rescued on the high seas are receiving fair and humane treatment under our immigration laws.

Sincerely,

/s/ Grover Joseph Rees III
GROVER JOSEPH REES III
General Counsel

PLAINTIFFS' EXHIBIT NO. 84

DECLARATION OF ROBERT RUBIN

I, Robert Rubin, hereby declare:

1. I am one of plaintiffs' counsel in this action. On May 25, 1992, I received a telephone call from Mr. Remy who is a member of the plaintiff class certified by this court. I know Mr. Remy's real name but choose not to use it due to his fear of retribution. I had personally counselled Mr. Remy during plaintiffs' counsel's stay at Guantanamo Bay on March 30-31, 1992, authorized pursuant to this court's temporary restraining order.

2. Mr. Remy was calling me from somewhere in Haiti although he was afraid to say exactly where he was. He had been repatriated from Guantanamo on or about April 28, 1992, after refusing to undergo a second uncounselled asylum screening. He had been found by the Immigration and Naturalization Service to have a "credible fear of persecution" based upon his fear of the military soldiers who had raised his house and sought to punish him for his open support of former President Aristide. These soldiers knew of Mr. Remy's prominent role in pro-Aristide organizations including the National Front for Change and Democracy (FNCD).

3. During our telephone conversation, Mr. Remy stated that he has been in hiding in the mountains since he was forcibly returned to Haiti. He said that it is not safe for him to be in Port-au-Prince and that, during this past week, many people were killed in Port-au-Prince.

4. Mr. Remy stated: "My life is really in danger. The killers are very hungry."

5. I described to Mr. Remy the provisions of the May 24, 1992 Executive Order "Interdiction Of Illegal Aliens." In particular, I told him about its reference to the availability of refugee processing at the U.S. Embassy in Port-au-Prince. He responded: "It is not safe for me to go to the Embassy." He added that that is the reason why he

has remained in hiding in the mountains outside the city. He is hopeful of evading detection by the military and is waiting for another opportunity to flee Haiti.

6. I also advised Mr. Remy that, under the new Executive Order, if he fled Haiti again, the fact that he has a credible fear of persecution might not stop the Coast Guard from returning his boat to Haiti. He expressed distress upon learning this fact because this new procedure closes an avenue of escape from the persecution he confronts in Haiti.

7. On May 27, 1992, Mr. Remy called me again. He sounded even more desperate as he stated: "The military knows that I am back in the country. I have to keep moving to stay alive." Mr. Remy also reiterated: "I have no guarantee of safety at the U.S. Embassy so I cannot go there. Please do what you can for me."

I declare under penalty of perjury that the foregoing is true and correct.

May 27, 1992
San Francisco, California

/s/ Robert Rubin
ROBERT RUBIN

PLAINTIFFS' EXHIBIT NO. 85

DECLARATION OF ELLIOT SCHRAGE

I affirm under penalty of perjury that the following is true and correct to the best of my knowledge.

1. My name is Elliot Schrage. I am a lawyer and consultant to a number of human rights organizations, including the Lawyers Committee For Human Rights, Helsinki Watch, and the Robert F. Kennedy Memorial Human Rights Center.

2. From May 1 to 10, 1992, I was a member of a Lawyers Committee delegation investigating the status of human rights in Haiti since the coup of September 30, 1991. We were also following up on previous Lawyers Committee reports on Haiti, including but not limited to "Paper Laws, Steel Bayonets: Breakdown of the Rule of Law in Haiti", December, 1990. This was my fourth trip to Haiti since 1988.

3. On the morning of Sunday, May 10, 1992, a Haitian man arrived at my hotel in Petion-Ville with his left arm wrapped in bandages. I know his name, but do not reveal it here because he is concerned for his safety if his identity should become known to the Haitian authorities. I am aware that this man is a named plaintiff in *Haitian Centers Council v. McNary*. For the purposes of this declaration, I shall call this Man M. Bertrand.

4. In each of my missions to Haiti over the last four years, as well as in missions to Africa and Eastern Europe, I have acquired considerable experience interviewing claimed victims of political persecution. My work requires me to make evaluations of the credibility and consistency of such claims, and I consider the ability to make a neutral, objective evaluation of credibility central to my work. Based upon my experience, I find the account given me by M. Bertrand to be internally consistent, consistent with the situation in Haiti at this time,

and credible. I did not, however, make any attempt to corroborate his account.

5. What follows is the account given to me by M. Bertrand relating to his attempt to leave Haiti, his forcible repatriation, and its consequences.

6. M. Bertrand fled Haiti in December 1991, and was picked up by the Coast Guard. In late December, M. Bertrand was found by U.S. officials on Guantanamo to have a credible fear of political persecution. On that basis, he was transferred to a section of the refugee camp on Guantanamo reserved for Haitians who had been "screened-in." Because he was told that any further evaluation of his asylum claim would take place in the United States, Mr. Bertrand refused to submit to a second asylum screening interview on Guantanamo, along with many other Haitian refugees. As a result of this refusal, M. Bertrand and other members of this group were forcibly repatriated to Haiti by the U.S. government.

7. The Coast Guard vessel transporting them left Guantanamo on April 28, 1992, and arrived at Port-au-Prince on April 29. Firehoses were used to force some of the refugees, including M. Bertrand, from the ship. He along with other refugees were fingerprinted by Haitian authorities upon their arrival.

8. The day of his arrival in Port-au-Prince, M. Bertrand went to the home of his grandmother, where he spent his first night back in Haiti. The next afternoon on April 30, at approximately 4:00 p.m., M. Bertrand encountered a man in the neighborhood whom he knew to be a member of the Haitian military forces. (Through he was not in uniform on this occasion, M. Bertrand had seen the man in uniform in the past.) This man recognized M. Bertrand, and expressed surprise at seeing him, saying, "You, you've returned here?" M. Bertrand immediately rushed away.

9. At approximately 11:00 p.m. that night, while M. Bertrand was in bed, there was a knock at the door of

his grandmother's house. His younger brother answered the door, where three men asked for M. Bertrand. M. Bertrand came to the door, where he recognized one of the three as the military man he had seen earlier in the day.

10. The three men entered the house and grabbed M. Bertrand. They threw him on the ground and beat him repeatedly. One man pistol-whipped M. Bertrand on the back of his head with the butt of his revolver. (M. Bertrand showed me the mark from the blow). M. Bertrand tried to protect himself, with his arms, but a blow from the men fractured his left arm.

11. M. Bertrand began to scream for help, and the three men ran out of his grandmother's house. Shortly thereafter, fearing for his safety if he remained, M. Bertrand also left the house. He has not returned to that house since.

12. M. Bertrand is now in hiding outside Port-au-Prince. I am aware of his approximate location, but because of his concern for his safety I choose not to reveal it here. I am able to contact M. Bertrand indirectly through a relative of his in Port-au-Prince.

13. M. Bertrand appears to sincerely fear for his life as a direct result of persecution he has encountered since his repatriation to Haiti.

14. It is my professional assessment that M. Bertrand's fear for his safety is well-founded.

Signed and sworn to this 11th day of May, 1992.

/s/ Elliot J. Schrage
ELLIOT SCHRAGE

PLAINTIFFS' EXHIBIT NO. 86

DECLARATION OF WILLIAM G. O'NEILL

I affirm under penalty of perjury that the following is true and correct to the best of my knowledge.

1. My name is William G. O'Neill. I am a lawyer and the Deputy Director of the Lawyers Committee for Human Rights. I speak fluent French and understand Creole. I reside in Brooklyn.

2. From May 1 to 10, 1992 I was the leader of a Lawyers Committee delegation investigating the status of human rights in Haiti since the coup of September 30, 1991. This was my eighth trip to Haiti since I first visited in 1974. Our delegation met with about 100 individuals during our stay.

3. I have interviewed dozens of Haitian applicants for political asylum and hundreds of Haitians who claim to be victims of human rights abuses. I have had extensive experience in analyzing and assessing the credibility of claims for asylum and refugee status made by Haitians and others. I was co-author of a 200-page Lawyers Committee report on Haiti entitled "Paper Laws, Steel Bayonets: Breakdown of the Rule of Law in Haiti," December 1990.

4. On Friday evening, May 8, I met with Dudley Sipprelle, Consul General at the United States Embassy in Port au Prince, Haiti. Mr. Sipprelle told me that since the consulate began refugee processing in Haiti in January there had been 145 applications, representing 190 people (sometimes children are processed with their parents, or families are processed together). Of these applications, eleven have been approved as refugees, twenty-five have been rejected, and the remainder are still pending. Though the Haitians apply at the consulate, which is run by the Department of State, the refugee applications must be adjudicated by a "circuit-riding" INS official based in Mexico City who is also responsible for applications made in Haiti.

5. During my trip, a colleague, Elliot Schrage, and I spoke to three Haitians who had applied for refugee status but had been turned down. My professional assessment based on my experience in Haiti and my work evaluating claims of politcal persecution is that all three had extremely strong claims for refugee status. All three described their interviews as interrogations, adversarial and unfriendly processes in which they were pumped for information about ousted President Jean-Bertrand Aristide and his supporters. All three applicants expressed concern that they had entrusted confidential information on their activities and whereabouts to strangers, and that if this information somehow found its way into the wrong hands their lives would be in danger.

6. Two of the three applicants had been bodyguards of Aristide himself, and they were with the President the night of the coup. The two men came to the attention of the U.S. consulate only through the dedicated efforts of foreign priests based in Haiti. The bodyguards were interviewed by two different three-person panels, and both received form letters written in French, not Creole, suggesting the grounds for their denials: a box marked "212(a)(1)(A)." Mr. Sipprelle admitted that to consider this French-language form letter meaningful notice would be absurd. Mr. Sipprelle went on to explain that this citation meant the two applicants had been approved as refugees pending a medical examination; Subsequent medical tests indicated, however, that the two men were HIV positive. The men were not told of their test results, nor that they were entitled to request another medical test.

7. The third applicant denied refugee status was interviewed by Mr. Schrage.

8. Both the U.S. Consulate, where refugee applications are processed, and the U.S. Embassy in Port-au-Prince are seen as forbidding, potentially dangerous places for Haitians. The U.S. Embassy is next to the

National Parliament, a heavily militarized part of the capital. The Consulate is near the University, another area frequently filled with soldiers. Both compounds have high walls around them, and the U.S. government has hired numerous Haitian security guards to patrol the area around the Embassy and the Consulate. To monitor Haitian visitors to the Embassy and Consulate is easy for the Haitian authorities, and thus few Haitians dare risk a visit for the slim chance at refugee status. Without a high-level introduction, few people even try.

9. The general human rights situation in Haiti in early May was a nightmare, the worst conditions I have ever witnessed in that country. Our delegation documented numerous cases of arbitrary arrest, illegal detention, mistreatment of detainees that includes torture, a severe crackdown on freedom of expression, censorship of the press, bans on free association, and pervasive violations of most basic human rights. The soldiers indulge in these abuses with lawless impunity, and as far as I know not one soldier has been investigated or prosecuted for the thousands of human rights violations that have occurred in Haiti since the coup.

10. One person I spoke with was a nun, about thirty years old, stocky with a dark complexion. She was illegally arrested on April 27th, just days before our arrival, for possessing calendars with Aristide's picture, and held until May 2nd; I met her on May 4th at the place where she is hiding. During her detention this nun was given little food and almost no water, and she was held in horrible conditions in an overcrowded cell. She was verbally abused and threatened by the guards, and when another nun came to bring her necessary medication one day, the second nun was also arrested. The nun I spoke to was released only after the intervention of several bishops, but she remains terrified and cannot return to her convent in the countryside.

11. A second person I spoke with was a lawyer in the southwest, in a town called Les Cayes. This lawyer

had been active in training paralegals and teaching citizens about basic legal rights before the coup, and was eventually named Director of Education for the region by President Aristide. Shortly after the coup the lawyer was forced to flee into hiding, and he returned home to test the water only several weeks ago. Upon his return the lawyer resumed teaching a course in Haitian history at the local high school. Shortly before I arrived in Haiti he re-hung a sign reading "Avocat" (lawyer) outside his door. On Tuesday, May 5, two soldiers on motorcycles, armed with sub-machine guns, came to the lawyer's house and confronted him. Soon more soldiers took up positions on the street. After a tense stand-off, the soldiers left, threatening to return. When I visited this lawyer on Saturday, May 9, he had not been outside his house since the incident. Throughout our conversation he remained very agitated, and his wife watched the front gate anxiously for signs of trouble.

12. A third person I met was a reporter for the Creole-language Voice of America radio station, a brash young man of twenty-five. This reporter fled his home because twice in December soldiers had come looking for him, and he received personal death threats over the telephone. After leaving Haiti I heard from a credible source there that this journalist was covering a demonstration on May 22 at a girls' high school in Port-au-Prince when soldiers arrived, destroyed his equipment, and beat him severely.

13. During this trip to Haiti I noticed many differences from earlier trips. Though torture and murder are not as common as they were in the immediate aftermath of the coup, the authorities continue to kill some people, and they use many tactics to intimidate and threaten most citizens. Beneath a veneer of normalcy is enormous fear, a gripping terror that moved Haitians to behavior I have never witnessed in previous visits to this country. People are afraid to talk on the telephone

and to give exact locations. People are far more anxious about documents—one priest I spoke to now routinely memorizes and destroys important papers. People now frequently change their place of rest, sleeping one place tonight, another tomorrow. To locate people now often requires passing through two or three friends who act as intermediaries. On the roads there are far more military checkpoints than ever before, and the soldiers who staff them are much more assertive in demanding official papers. Haiti's human rights nightmare is far from over.

Signed and sworn to this 26th day of May, 1992.

/s/ William G. O'Neill
WILLIAM G. O'NEILL

PLAINTIFFS' EXHIBIT NO. 87

DECLARATION OF RONALD AUBOURG

I affirm under penalty of perjury that the following is true and correct to the best of my knowledge.

1. My name is Ronald Aubourg. I am the Administrative Assistant of the National Coalition for Haitian Refugees, a plaintiff in this case, which is located in Manhattan. I was born in Haiti but moved to the United States in 1977. I have returned to Haiti several times since then, and I am fluent in English, Creole, and French.

2. From May 14 to 18, 1992 I was in Haiti visiting relatives and investigating the status of human rights, pursuant to my responsibilities at the Coalition and our obligations as counsel to a number of Haitians who have been forcibly repatriated in recent weeks.

3. It is my professional assessment that the human rights conditions in Haiti are horrible. I lived in Haiti for two years, from 1988 to 1990, under the Manigat, Namphy, and Avril regimes. Current conditions in Haiti are far worse than they were under these repressive regimes. Today, the lives of thousands of young Haitians, particularly those in urban areas, are in grave danger from systemic murder and torture by the military authorities. The Haitian soldiers do not hesitate to murder or do great bodily harm to any citizen, whether one is actively opposing the military dictatorship or merely finds oneself in the wrong place at the wrong time.

4. To expect Haitians who fear political persecution to apply for refugee status at the U.S. Embassy or Consulate in Port-au-Prince is ludicrous. People who fear political persecution are in hiding, mostly in the countryside, and they are in hiding because the military is actively looking for them. To enter the capital city from the countryside, a refugee must pass through numerous military roadblocks on the roads into Port-au-Prince. On

my recent trip I passed through one such roadblock, so I know that they are maintained by armed soldiers who search cars for weapons, political materials, and especially dissidents in hiding. It is common knowledge in Haiti that the soldiers frequently ask for identification, and if they recognize someone as wanted by the military they will immediately handcuff and arrest that person. Of course, anyone repatriated from Guantanamo has been photographed and fingerprinted upon re-entry, and so there identities are already known to the military. Young adults who have been repatriated are particularly at risk.

5. If a refugee is fortunate enough to pass through the roadblocks outside Port-au-Prince, he will then have to make his way through the heavily militarized city to the Embassy or the Consulate. The Embassy is downtown, where there are many soldiers, and the Consulate is a few meters from an Army barracks where significant violence occurred after the coup.

6. The U.S. Embassy employs members of the Haitian Police to guard the Consulate compound, however, and a refugee arriving at the compound must confront these police first. These police will ask the refugee to identify himself, give his reason for coming to the Embassy, and state his place of residence. Because these officers work for the Haitian Police, they naturally report to their superior officers. Any refugee seeking asylum is extremely vulnerable to immediate reprisals by the police, who work closely with the army and other military authorities. It is considered fatally foolish in Port-au-Prince to introduce oneself to the Haitian authorities as a refugee from political persecution.

7. Violence was pervasive in Haiti during my entire stay. I arrived in Port-au-Prince Thursday afternoon, May 14th, and stayed in the neighborhood of Lalue. Throughout the night I heard sporadic gunfire in the area, and the next morning I learned that three or four people had been killed by the military in this area alone.

8. The next morning, Friday May 15th, practically all of the 400-500 secondary school students at Lycee Petion began a peaceful protest, calling for the resignation of the dictators and the return of President Aristide. A friend whom I find credible was in the neighborhood, and he told me that soldiers surrounded the school and closed it off from a block away. I heard broadcasts on the private station Radio Tropical report that the soldiers viciously beat the students. The radio also reported that some students tried to lock themselves in classrooms for protection, but six or seven were arrested and taken away. That night the city was extremely tense, anticipating more military oppression, and the streets were deserted.

9. On Saturday the city remained eerily quiet, as people hid indoors. I went out to another area in metropolitan Port-au-Prince, called La Plain. Soldiers were out everywhere, holding their Uzis and M-16s as if they were ready to fire. That day I personally witnessed a number of brutal acts by the military. I saw one young man being severely beaten by a uniformed policeman with a gun. I drove slowly past as the policeman slapped the man in the face and punched him repeatedly.

10. Later I stopped about twenty feet from two armed men in civilian clothes who were beating a bearded man, perhaps thirty years old, who was screaming and bleeding from his nose. The victim was leaning against a coconut tree, and his clothes were ripped. It appeared that his attempts to block the blows of the soldiers had angered them, inciting them to more violence.

11. Still on Saturday, I saw from afar that a third man was being beaten by a member of the Haitian military wearing civilian clothes. I came closer, and heard the short, light-skinned victim, a teenager with reddish hair, crying and screaming that he hadn't done anything. It was a terrible scene.

12. On Sunday I did not go out. On Monday Port-au-Prince was terrorized again. A plane dropped leaflets over the city with pictures of Aristide and calls to the Haitian people to mobilize. Soldiers came out in large numbers, and the people knew that brutal violence would follow. I went to Carrefour-feuilles, one of the places where leaflets were dropped and a neighborhood famous for its resistance to the coup and its support for Aristide. One of the first things I noticed when I arrived at Carrefour-feuilles was graffiti visible on many walls, proclaiming in red "Up with Aristide! Down with the military!". As I was leaving Carrefour-feuilles, I saw two trucks full of soldiers coming towards me. I moved out of the way, but soon after the trucks passed 50-70 heavily armed soldiers jumped down and began beating anyone on the street with their rifle butts. Anyone in the path of the soldiers was savagely attacked, especially teenagers and young adults.

13. Also on Monday I finally succeeded in meeting with a refugee who has been identified in other declarations as "M. Bertrand," a named plaintiff in *Haitian Centers Council v. McNary*. I had met M. Bertrand when I joined the plaintiff organizations' delegation to Guantanamo Bay Naval Base in late March.

14. Though screened-in, M. Bertrand was forcibly repatriated by the United States and attacked by soldiers within 48 hours of his return. Since then, he has been in hiding. M. Bertrand told me that his fears had increased significantly since he met with an American lawyer in Haiti in early May. M. Bertrand came to see me accompanied by two large men, who he described as witnesses should anything happen to him. M. Bertrand said that conditions in Haiti had worsened substantially and that tensions were extremely high. He very much feared for his life. It is his view, however, that without high-level intervention on his behalf, to approach the

U.S. Consulate and identify himself to the Haitian Police stationed there would be suicide.

Signed and sworn to this 26 day of May, 1992.

/s/ Ronald Aubourg
RONALD AUBOURG

PLAINTIFFS' EXHIBIT NO. 88

DEPOSITION OF SCOTT WILLIAM BUSBY,
MAY 6, 1992

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[34] A. I would say probably about a third.

Q. Did that average vary over the period of those approximately three weeks?

A. Yes, it did.

Q. Can you, as before, can you give me a chronological breakdown of what the average screen in rates were at the appropriate times?

A. The first few days I was there, after April 13, the rates were between five and 10 percent.

Q. They changed thereafter?

A. Yes, they did.

Q. What happened?

A. On approximately April 18 the rates went up to 20 to 25 percent for several days.

Q. Then?

A. I am not as familiar with the daily rates after that, but they ranged between 30 and 50 percent, on a daily basis.

Q. These screen in rates are statistics that are maintained by the Immigration Service; is that correct?

PLAINTIFFS' EXHIBIT NO. 89

DEPOSITION OF GUNTHER O. WAGNER
MAY 5, 1992

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[106] BY MR. GUTTENTAG:

Q. Did you go to people's home?

A. Yes.

Q. Approximately how many?

A. Numerous.

Q. Ten?

A. More than ten.

Q. Half of the persons you talked to

A. A good 450 or 500 homes, easy.

Q Those persons, who you did not talk to in their homes, where would you talk to them?

A. On the front steps of their house, in the street.

Q. You didn't have any sort of private room set up where you could interview people?

A. No.

Q. I take it that your presence in the village or town would be fairly obvious based upon your appearance; is that fair?

A. It is obvious, I was perhaps the only white [107] man in the village. But, that does not necessarily mean that the whole village came to the point where I talked to the individual.

Q. Do you have a copy of the report based on your December visit?

A. Yes, I do.

Q. When was that report finished?

A. The end of December.

Q. You sent it to Washington; is that right?

A. That's correct.

Q. You maintained a copy for yourself; is that correct?

A. That's correct.

Q. Did a copy go anywhere else?
A. No.
Q. What happened to the copy that went to Washington, if you know?
A. I have no idea.
Q. Did you ever hear anything about it?
A. No.

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[130] Q. Did you talk to anyone who was in hiding?
A. These are the ones I am referring to.
Q. Were any of those persons in hiding?
A. That is what they claimed that they were in hiding.
Q. The fact that they talked to you in public demonstrated their claims were not credible?
A. That's correct. Because the individual is out in the street, as far as I am concerned, he is not hiding.
Q. I may have asked you this earlier in which case I apologize, other than your duties in relation to your debriefing at GITMO and your visits to Haiti, your normal job at the INS does not require you to make credibility determinations; is that correct?
A. This is the first time, yes, that I was called upon for this, this type of duty, to debrief, to verify allegations of problems in a given country, yes.

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[141] Q. Again, it is those people who you are able to contact in one way or another while you were in Haiti; is that right?
A. That's correct
Q. Not those people who refuse to speak with you or didn't come forward to contact you in some way; is that right?
A. Yes. How can I recollect that I remember anybody who refused to speak to me?
Q. You wouldn't know if they refused to go where you were?

A. It is conceivable that somebody didn't come forward, yes.

(A recess was taken.)

(The record was read as requested.)

BY MR. GUTTENTAG:

Q. Mr. Wagner, you never spoke with any persons who initially had been screened in at Guantanamo; is that right?
A. Yes.
Q. So nothing in your report is relevant to the fate of the screened in persons who might have [142] not been screened in to Haiti; is that right?
A. That's correct.
Q. The third report that you prepared, based on your third visit to Haiti, you have completed that; is that correct?
A. Yes, sir.
Q. That has been sent to Washington as well?
A. That's correct.
Q. Do you have a copy?
A. I have a copy.
Q. Do you know whether anyone else has a copy?
A. The only copies I made for my office and for Washington.
Q. Do you know what happened with the copy that you sent to Washington?
A. As I said in the previous two reports, I have no idea what the disposition is of these reports.
Q. Did you ever receive any feedback on the report?
A. Not from the last one, no.

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PLAINTIFFS' EXHIBIT NO. 94

DECLARATION OF ELLIOT J. SCHRAGE

I affirm under penalty of perjury that the following is true and correct to the best of my knowledge.

1. My name is Elliot J. Schrage. I am a lawyer and have served as a consultant to a number of human rights organizations, including the Lawyers Committee for Human Rights, Helsinki Watch, and the Robert F. Kennedy Memorial Human Rights Center.

2. From May 1 to 10, 1992, I was a member of a Lawyers Committee delegation investigating the status of human rights in Haiti since the coup of September 30, 1991. We were also following up on previous Lawyers Committee reports on Haiti, including but not limited to "Paper Laws, Steel Bayonets: Breakdown of the Rule of Law in Haiti," December, 1990. This was my fourth trip to Haiti since 1988.

3. On May 10th, I interviewed a Haitian man who is in hiding and has been since shortly after the coup. I know his name, but do not reveal it here because he is concerned for his safety should his identity become known to the Haitian authorities. For the purposes of this declaration, I shall call this man Mr. H.

4. In each of my missions to Haiti over the last four years, as well as in missions to Africa and Eastern Europe, I have acquired considerable experience interviewing claimed victims of political persecution. My work requires me to make evaluations of the credibility and consistency of such claims, and I consider the ability to make a neutral, objective evaluation of credibility central to my work. Based upon my experience, I find the account given to me by Mr. H to be internally consistent, consistent with the situation in Haiti at this time, and credible. I did not, however, make any independent effort to corroborate his account.

5. Mr. H was active in a number of community groups in and around Cap Haitien, and had organized literacy projects in the region. After the coup, the police raided the place where Mr. H was staying and broke up a meeting being held there. The authorities arrested and beat Mr. H, and held him in detention for a number of days. Upon his release, he fled into hiding.

6. Mr. told me that he had applied to the U.S. mission in Haiti for refugee status, with the assistance of a foreign missionary in Haiti. Mr. H told me that his application was denied on the grounds that he had failed to demonstrate a fear of political persecution.

7. Mr. H appears to genuinely fear for his life because of political persecution since the coup. In my professional judgment, Mr. H's fear for his safety is well-founded.

8. In addition to speaking with Mr. H, I spoke to several other Haitians who had applied or who were preparing to apply for refugee status. All undertook this risky process only because they were assisted by prominent Haitians or foreigners in Haiti. In my professional assessment, any Haitian in hiding and fearing political persecution—especially one hiding in the rural areas outside Port-au-Prince—would be risking his life by approaching the U.S. Consulate or Embassy and declaring his intention to apply for refugee status.

Signed and sworn to this 26 day of May, 1992.

/s/ Elliot J. Schrage
ELLIOT J. SCHRAGE

PLAINTIFFS' EXHIBIT NO. 95

DEPOSITION OF GROVER JOSEPH REES III

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[107] They have now given us, I am told, a list, either they have given it or we generated a computer list doing the same thing they did to generate the earlier list, and there is a list of some 180 who appear to have been noted as screened in at some point in the process and who, on the other hand, appear on some other list as having been repatriated.

Now, there are several things that could have happened in order to get you on both of those lists. One is that you could have been, as the 34 we found were, out of the original 44, you could have been just listed in a computer as screened in when you were really screened out and you were repatriated according to the rules that were followed and you were repatriated.

The second possibility—the first [108] reason was just the erroneous notation, that the person was really—we are back on the record? I'm sorry.—the person was really screened out and he was sent back, but somewhere somebody made a computer entry that said he was screened in; that is one possibility.

The second possibility is that the person really was screened in and voluntarily repatriated. The third possibility is that it is really a subset of the first possibility, which is that he or she was screened out, was not found to have a credible fear, but had a relative in the camp, a close relative on the basis of whom our family unity policy would have said we can bring that person in, and I think that in the first batch CRS was categorizing those people as screened in, and it just depends how you count those, but that would have been a mistake, I think, because we would have wanted to bring those people into the country, but it obviously wouldn't be a mistake on the order of the fourth possibility, which is that, in fact,

somebody had a credible fear of return and nevertheless was erroneously sent back to Haiti.

[109] Q This list is in addition to the 44 or 54—

A I think it is in addition. I think it would include the 44, because I think we generated it by the same principle that they generated the earlier list. It really reminded me a bit of Wheeling, West Virginia, they kept talking about different numbers, and I don't think it was anybody's fault. First we thought there were 44, then we thought there were 54, then we thought there were 80, and now we think there is 190.

As I understand, this was the only list of names that had actually been given, the first 44, so we kind of had a sense of what may turn out to be false confidence, because we checked the first 44 and we couldn't find 10 of the hard copies out of the 23,000 or so that we had, and we are still looking for those, but every one we found turned out to be in the most innocuous category.

It now appears, I have now looked at 20 hard copies, at about 30 or 40 hard copies that have been produced as a result of our search, and of those, I have looked at 20 hard copies of assessment [110] sheets who did appear to have been screened in and who do appear to have been repatriated.

Now, those could still conceivably be people who voluntarily repatriated, but they are not in that—

Q These are 20 from the first group of 40?

A No. This is out of the 190. That process is still underway, but I have been getting reports on it and I have seen 20 interview sheets that say screened in and where the person appears to have been repatriated and where there is no notation to the effect that the repatriation was voluntary.

Q How do you think these errors are happening? I understand you said particularly this first one they are erroneously entered. What is the process by which—

A Those people were correctly entered, obviously, because how we generated them was by looking at the com-

puter, and it says they were screened in. With the first batch, we found them and they said it was screened out. These appear this wasn't the mistake.

[111] Q Do you know what the mistake was at this point?

A Well, I don't, but—

Q Assuming there was a mistake.

A I don't know what the nature of the mistake was. I do know that it looks like there was a mistake with those 20 people and perhaps with more.

Q Out of the 190, there may be more?

A There could be.

Q You only reviewed 20 or 30 so far, is that right?

A I think I looked at about 40, actually.

Q How long do you think that review process will take?

A I don't know, but I think we are—it has already been a couple of weeks since we have been doing it, and it might be a couple of more weeks. I just don't honestly know.

* * * * *

[162] tested positive for HIV and who had somehow—I think you were vague about it, but the process had been shortened either because they hadn't wanted to go forward with it, they refused a second interview—I don't want to put words in your mouth.

A The process certainly was not shortened. What happened with those people was, before—again, I keep talking pre- and post- injunction, but that is how I remember these things—before the injunction, and I guess, therefore, it was in March, we learned that there were a number of people who had refused to accept a second interview, and that these people said no, we were promised we could go to Miami, and we just want to go to Miami, we don't want to talk to you anymore, and that what we did at that time was to try to conduct some education, we put together a verbal announcement which

was a precis of that memo explaining briefly, you know, what American law is about medical exclusions and saying you really do have to come talk to us, this is the same interview, in substance, that you would get if you came to the United States, but we don't want to let you into the [163] United States to have it because then you would be there and you would have a medical exclusion, and that's where we started.

Some people came forward at that point. We then made an announcement that said if you don't do this, you know, this is your chance, this is your chance to show us that you are a refugee, that you have a well-founded fear of return, and only when we know that are we going to start doing the things that we have to do to find out if you can get a parole.

If you don't wish to show us that you are a refugee, we will conclude that you are not and we will send you back to Haiti, and this announcement was made, I am told that it was published in the camp newspaper that the JTF was putting out at that point, the Sakpas, and I think that is spelled actually S-A-K-P-A-S, or something to that effect, it is a Creole spelling of what would otherwise be a French expression, and that that announcement was published substantially verbatim in that newspaper.

Then, of course, nothing happened for three weeks, and when the injunction was lifted, we [164] concentrated on interviewing the people who would come forward for interviews. When that had been done, we got back to this other issue and we learned that, rightly or wrongly, these people, through a channel of communication with the United States, wrongly, in our view, had been told that if they could wait until May 7th, that then they would have lawyers again and that we really weren't allowed to repatriate them, anyway, so we were sort of bluffing, and that we couldn't send them back to Haiti, and that what they had to do was refuse the interview. Now, whoever told them that was giving them very bad advice, and we

had to concentrate on trying to convince them that that really wasn't true.

Q Do you know who told them that?

A I have the impression that it went through the chaplain who was talking to some of the plaintiffs' lawyers, but I would be wrong.

Q Impression, or do you have any evidence of that?

A No, I have the impression, I draw the inference from the May 7th date, which was at the [165] time that the Second Circuit was going to hear the appeal.

Q But you have no evidence other than your conclusion?

A No—well, let me think. Somebody may have told somebody that it was through the chaplain, but, of course, we don't know exactly. We do know that the chaplain had been talking to the plaintiffs' lawyers, but somebody had been giving these people the very bad advice that if they could only hold out until May 7, but, obviously, that put us in an awkward position, because we didn't want—you know, if it wasn't for that factor in the equation, it was not an unreasonable inference to draw that somebody who didn't want to participate in the interview process anymore after he had been told over and over again that if you don't do this, you are going to return to Haiti, didn't really mind returning to Haiti as much as some of the other people.

We were worried that people really were going to think that we were bluffing, and if we had, for instance, after their name was called the first [166] time and turned them down, just put them on a boat to Haiti, that we might be sending back some people who, in fact, had a well-founded fear and were just mislead as to the circumstances.

So we must have made this announcement five or six times on successive days, and we did it with increasing both—we kind of emplored them to come forward for their interview. We sent Scott Busby, who was—I think it was Scott, it was either Scott or Charlie, one of the two

quality control officers, with an interpreter to the gate to talk with someone who apparently was the leader of an organized group and to try to explain this, aside from the announcements, and this person said no, we know if we can just wait until May 7th, we will have lawyers, and I said no, that is really not true, this is a prediction, but it's not likely to happen and you will be repatriated if you don't come forward for this interview. So I know that at least that one encounter at the gate happened.

There were also several announcements. Finally, after at least three or four days of this, [167] they were moved into—to the hangar area and told again—

Q The 88?

A The 89, actually at that point, plus nine people who were family members who did not themselves have HIV, but who were only—but who did not have a credible fear and were only there because of their family member, those 98 people were brought to the hangar area, and the announcement was made again, we had six teams there ready to interview anybody that wanted to be interviewed, I believe they were held there for a day, and then the next morning they were put on a bus, an announcement was made on the bus that this is really it, you can still be interviewed, even—you know, you can all be interviewed right now, we are going to the boat and you are going back to Haiti, but if you would prefer to have an interview, we will plug you right back into the process, and I am told by someone who was there that they cheered when they were told they were going back to Haiti.

Q Who told you that?

[168] A Jennifer Barnes, my lawyer who was there and who had dictated the content of the announcement, and she said—obviously, she doesn't understand Creole, but she was asked by—she asked one of the interpreters who was there what did they just say, and he said they are cheering because they are going back to Haiti. Then each one was asked as he got—he or she got off the bus

on the way to the boat, are you sure that you don't want an interview? You are getting on the boat to go back to Haiti, but if you would like to have an interview, you can have one. One person said he did after all want an interview and he was sent back to the camp.

Q Do you know who that was?

A I don't know his name, but one did, so that is why it went down from 89 to 88, and the other 88 were put on the boat.

Q You can get me his name, I presume?

A I think so.

Q Now, did they—when they protested this, did they say they wanted lawyers before they went through a second interview?

[169] A I didn't hear that that was said. I think that they said that after May 7th they would have lawyers.

Q Effectively saying they wanted lawyers, in that sense?

MR. BOMBAUGH: I'm going to object to the characterization.

THE WITNESS: I don't know.

MR. RATNER: Withdraw it.

BY MR. RATNER:

Q Before getting them onto the bus, are you aware that any threats of force had to be used to get them out to the bus?

A I am aware that—I've talked to people who were there who said nothing like that happened.

Q Did you ask about that?

A I asked about how it happened, and I was told that they went voluntarily. Obviously, it had been anticipated that that might happen, because here are people who don't want to come forward for the interviews and, in fact, my people who were there were surprised that everyone went forward to get on [170] buses and to get on boats and things, even though they were unwilling to

go forward for the interview, but, yes, I was affirmatively told, I don't think I even had to ask, I was told they all went willingly, and obviously the big surprise was the cheering on the bus.

Q And they were all loaded onto the same Coast Guard cutter, as far as you know?

A That's right, yes.

Q Have you ever heard of the Association of Haitian Political Refugees?

A I have not. I may have seen a screening sheet or somebody said they belonged to it, but the name doesn't ring a bell right now.

Q Was there any difficulty that you heard of in having them depart the boat when they arrived in Haiti?

A I received an unclassified cable that I assume I can talk about—

MR. BOMBAUGH: Sure.

THE WITNESS: —from the Coast Guard saying that when they got there, about 60 of them got [171] off, and then the remaining 30 or so said that they didn't want to get off and that they had been told they were going to Miami and that they would rather die on the boat than go back to Haiti, and that several of those people were then taken off, physically removed, and that the rest of them went voluntarily.

Obviously, I did my best to recheck at that point the story that I had been given for any suggestion that anyone could at any time have told them that they were going back to—that they were going to Miami, and I must have checked it five different ways, and everyone —you know, I am dealing with people that I trust, and they say it is absolutely impossible; what they could mean, the only possible germ of truth is that they were reasserting that they at some earlier point in the process had been told they were going to Miami, but they were clearly told they were going to Haiti, and, you know, the lawyer who I had on the bus went so far as to go back and talk to the two Creole speaking people who were on

the bus, the person making the announcement [172] and the person who she had talked to who was one of our interpreters, to make sure that there was no possible ambiguity about it and that her announcement, the one that she had given them, had in fact been given, and she was told again, yes, it was, there was no funny business, they were told that they were going back to Haiti.

Q Did you hear anything about a threat to use fire hoses to get them off the boat when they came to Haiti?

A That was in the Coast Guard cutter, in the Coast Guard cable, and it is the only thing I know about, it is that fire—you have undoubtedly seen it, it says that fire hoses were charged. I don't know—it doesn't say a threat was made, but it said that fire hoses were charged.

Q Are you familiar with what I would like to refer to as a flowchart for how to treat people with HIV-positive on Guantanamo?

A I have not seen a flowchart. It is not out of the question that somebody made one up.

Q Let me see if I have one.

PLAINTIFFS' EXHIBIT NO. 105

OFFICE OF THE

UNITED NATIONS HIGH COMMISSIONER

FOR REFUGEES

HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS

under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees

Geneva, September 1979

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18. The above mentioned Resolution 428(V) and the Statute of the High Commissioner's Office call for co-operation between Governments and the High Commissioner's Office in dealing with refugee problems. The High Commissioner is designated as the authority charged with providing international protection to refugees, and is required *inter alia* to promote the conclusion and ratification of international conventions for the protection of refugees, and to supervise their application.

19. Such co-operation, combined with his supervisory function, forms the basis for the High Commissioner's fundamental interest in the process of determining refugee status under the 1951 Convention and the 1967 Protocol. The part played by the High Commissioner is reflected, to varying degrees, in the procedures for the determination of refugee status established by a number of Governments.

F. Regional instruments relating to refugees

20. In addition to the 1951 Convention and the 1967 Protocol, and the Statute of the Office of the United Nations High Commissioner for Refugees, there are a number of regional agreements, conventions and other instruments relating to refugees, particularly in Africa, the Americas and Europe. These regional instruments deal with such matters as the granting of asylum, travel documents and travel facilities, etc. Some also contain a definition of the term "refugee", or of persons entitled to asylum.

21. In Latin America, the problem of diplomatic and territorial asylum is dealt with in a number of regional instruments including the Treaty on International Penal Law, (Montevideo, 1889); the Agreement on Extradition, (Caracas, 1911); the Convention on Asylum, (Havana, 1928); the Convention on Political Asylum, (Montevideo, 1933); the Convention on Diplomatic Asylum, (Caracus, 1954); and the Convention on Territorial Asylum (Caracus, 1954).

22. A more recent regional instrument is the Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government of the Organization of African Unity on 10 September 1969. This Convention contains a definition of the term "refugee", consisting of two parts; the first part is identical with the definition in the 1967 Protocol (i.e. the definition in the 1951 Convention without the dateline or geographic limitation). The second part applies the term "refugee" to:

> "every person who, owing to external agression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".

23. The present Handbook deals only with the determination of refugee status under the two international instruments of universal scope: the 1951 Convention and the 1967 Protocol.

G. Asylum and the treatment of refugees

24. The Handbook does not deal with questions closely related to the determination of refugee status e.g. the granting of asylum to refugees or the legal treatment of refugees after they have been recognized as such.

25. Although there are references to asylum in the Final Act of the Conference of Plenipotentiaries as well as in the Preamble to the Convention, the granting of asylum is not dealt with in the 1951 Convention or the 1967 Protocol. The High Commissioner has always pleaded for

a generous asylum policy in the spirit of the Universal Declaration of Human Rights and the Declaration on Territorial Asylum, adopted by the General Assembly of the United Nations on 10 December 1948 and on 14 December 1967 respectively.

26. With respect to the treatment within the territory of States, this is regulated as regards refugees by the main provisions of the 1951 Convention and 1967 Protocol (see paragraph 12(ii) above). Furthermore, attention should be drawn to Recommendation E contained in the Final Act of the Conference of Plenipotentiaries which adopted the 1951 Convention:

> "The Conference
>
> Expresses the hope that the Convention relating to the Status of Refugees will have values as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides."

27. This recommendation enables States to solve such problems as may arise with regard to persons who are not regarded as fully satisfying the criteria of the definition of the term "refugee".

PART ONE

Criteria for the Determination of Refugee Status

CHAPTER I

GENERAL PRINCIPLES

28. A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

29. Determination of refugee status is a process which takes place in two stages. Firstly, it is necessary to ascertain the relevant facts of the case. Secondly, the definitions in the 1951 Convention and the 1967 Protocol have to be applied to the facts thus ascertained.

30. The provisions of the 1951 Convention defining who is a refugee consist of three parts, which have been termed respectively "inclusion", "cessation" and "exclusion" clauses.

31. The inclusion clauses define the criteria that a person must satisfy in order to be a refugee. They form the positive basis upon which the determination of refugee status is made. The so-called cessation and exclusion clauses have a negative significance; the former indicate the conditions under which a refugee ceases to be a refugee and the latter enumerate the circumstances in which a person is excluded from the application of the 1951 Convention although meeting the positive criteria of the inclusion clauses.

DEFENDANTS' EXHIBIT NO. 1

DECLARATION OF BERNARD W. ARONSON

1. I, Bernard W. Aronson, am the Assistant Secretary of State for Inter-American Affairs. Under the general direction of the Secretary of State, I have primary responsibility for formulating and implementing U.S. foreign policy with respect to the countries in Latin America and the Caribbean. I have held this position since June 1989.

2. During this time period, I have devoted considerable time to formulating and carying out U.S. foreign policy toward Haiti, the poorest nation of those within the scope of my responsibilities. In that regard, I have played a principal role, in conjunction with officials from other U.S. agencies, in shaping U.S. policy responses to important events which have occurred in Haiti during the last year, including the historic and unprecedented free elections that were held in December 1990. In the post-election period, I have provided foreign policy direction to United States Government initiatives in support of the duly elected government of President Jean Bertrand Aristide, and in support of constitutional democracy [in] Haiti.

3. On September 30, 1991, the Aristide government was overthrown by a military coup. In the aftermath of the coup, a larger number than usual of Haitian national have chosen to leave their country, many seeking to sail to the United States in unseaworthy vessels. United States Coast Guard cutters have saved the lives of literally hundreds of Haitians by rescuing those found on the high seas in such vessels. These United States Government humanitarian efforts however have created an urgent, practical problem of what additional steps should now be taken with those who have been rescued, consistent with U.S. law and U.S. international legal obligations.

4. In an effort to devise an appropriate response to this situation, the Department of State launched a multinational diplomatic initiative, with the personal participation of President Bush and Secretary Baker, to identify third countries, particularly those in the region, who might be willing to provide temporary safehaven to Haitians rescued at sea. Despite the considerable energy invested in this initiative, only four countries to date have agreed to take a limited number of such Haitians. At this time, the Governments of Honduras, Venezuela, Belize and Trinidad and Tobago have in total offered to provide safehaven for up to 550 Haitians. Our diplomatic efforts in this regard are continuing. Until we can enlist the support of other safehaven countries or the number of Haitians perilously at sea is drastically reduced, keeping open all reasonable options for addressing this issue, including the possibility of repatriation to Haiti, will remain [an] important foreign policy objective.

5. In the multilateral diplomatic arena, the Department of State has played a central role in helping to establish the civilian OAS mission to restore constitutional democracy in Haiti. In the past several weeks, I personally have visited Haiti along with my OAS counterparts three times in attempts to restore peace, stability, and constitutional democracy to Haiti.

6. In addition, I regularly receive reliable reports from official sources as to overall conditions within Haiti. At this time, I have no basis for believing that repatriated Haitians have been or would be persecuted, arrested, punished or otherwise harassed upon return. Based on the Department's longterm analysis of conditions in Haiti, it is clear that the majority of Haitians who seek to leave that country do so because of the underlying economic conditions.

7. I have supported the longstanding U.S. policy goal not to bring to the United States Haitians who have been

rescued at sea on U.S. Coast Guard cutters and who have no colorable claim to refugee status. In my view, an open door policy would only serve as an incentive for even larger numbers of Haitians to risk their lives attempting to reach U.S. shores by boat, when we have strong reason to believe that at best only fifty percent of those who sail from Haiti survive the journey. Accordingly, humanitarian concerns dictate taking every reasonable step, including repatriation to Haiti, to discourage such attempts. It is my firm belief that halting the interdiction of Haitians in unseaworthy vessels would not only result in additional, and potentially avoidable, Haitian deaths at sea, but would also further extend the humanitarian crisis throughout the region.

8. The migrant interdiction agreement between the United States and Haiti, signed on September 23, 1981 (TIAS 10241) has proven to be highly beneficial to the Alien Migrant Interdiction Operation program with respect to illegal Haitian migrants. The continued implementation of that agreement should not be interrupted or thwarted as a consequence of this lawsuit. In this regard, neither President Aristide nor the de facto regime in Haiti has repudiated that agreement.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Washington, D.C.

November 20, 1991

/s/ Bernard W. Aronson
BERNARD W. ARONSON

DEFENDANTS' EXHIBIT NO. 26

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 91-2653-Civ-Atkins

HAITIAN REFUGEE CENTER, INC., ET AL., PLAINTIFFS

v.

JAMES BAKER, III, ET AL., DEFENDANTS

ORDER GRANTING MOTIONS TO MAINTAIN THE AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AS THE CLASS ACTION ON BEHALF OF PLAINTIFFS AND FOR LEAVE TO FILE SUPPLEMENTAL PLEADING AND SECOND AMENDED COMPLAINT

The court has considered the above motions and memoranda in support. The court notes that an answer has not yet been filed. For the reasons set forth in such motions and memoranda, the motions are granted. Accordingly, the court hereby determines that the amended Complaint can be maintained as a class action.

DONE AND ORDERED at Miami, Florida, this 3rd day of December, 1991.

/s/ C. Clyde Atkins
Senior United States District Judge

DEFENDANTS' EXHIBIT NO. 67

(Pleadings in *Haitian Refugee Center* v. *Baker*)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 91-2653-Civ-Atkins

THE HAITIAN REFUGEE CENTER, INC. a Florida not-for-profit Corporation, and ROLAND PROVIDENCE, MOISE CHARLES, ERIC PIERRE, RAYMOND EDME, GOLBERT MIRACLE, ROLAND JEAN, ROOSEVELT ALEXIS, LUC LUXEMBOURG SANON, LEGER PIERRE FRANTZ, OCHEL ENGERRIL, JEAN MICHEL MARIO AVILUS, ARCHILLE BELVU, LUCIEN ROZIER, EMMANUEL SAINTIL, CONDANSER JOSEPH on behalf of themselves and all others similarly situated, PLAINTIFFS,

-against-

JAMES BAKER, III, Secretary of State, REAR ADMIRAL ROBERT KRAMEK and ADMIRAL KIME, Commandants, United States Coast Guard, GENE MCNARY, Commissioner, Immigration and Naturalization Service, The United States Department of Justice, Immigration and Naturalization Service, and the United States, DEFENDANTS.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL PLEADING AND SECOND AMENDED COMPLAINT

Plaintiffs move for leave to file the attached Supplemental Pleading and Second Amended Complaint for Declaratory and Injunctive Relief—Class Action ("Amended Complaint"), and in support of their Motion allege as follows:

1. The Amended Complaint sets forth occurrences and events which have happened since the date of the original petition filed herein and since the date of the Amended Petition and Complaint filed herein. Since the filing of the Amended Petition and Complaint, additional individual plaintiffs have asserted claims against defendants.

2. Fifteen new parties—all of whom are currently in detention on Coast Guard cutters or at Guantanamo Naval base are added as representatives of the class of plaintiffs. They have all been subjected to the INS failure to follow the terms of the Executive Order and the guidelines promulgated pursuant to it which has deprived the plaintiffs who are potential asylees of the protections set forth in the Refugee Act of 1980 and the Immigration and Nationality Act, that are extended to intercepted Haitians by the INS rule that all such Haitians who have a potential asylum claim are to be transported to the United States. The INS's failure to follow the terms of the Executive Order and its own guidelines has resulted in the denial of all the plaintiffs' First Amended rights of access and all the plaintiffs' procedural rights under the APA. The Amended Complaint sets forth no new claims for relief, but simply adds additional parties asserting the same claims for relief asserted in the Amended Petition and Complaint.

3. As defendants' answer has not as yet been filed in this action, and as discovery is still continuing by both parties, the granting of this Motion will not cause undue delay. As defendants have been advised of plaintiffs' intention to amend, defendants will not suffer prejudice in the making of their defense.

4. On Saturday, November 23, 1991, plaintiffs' counsel orally advised defendants' counsel that the complaint would be amended to add individual Haitian plaintiffs following the interviews thereof by plaintiffs' counsel that the Court had authorized.

WHEREFORE, in the interests of justice and for the reasons set forth in this Motion and the accompanying Memorandum of Law in support thereof, plaintiffs respectfully seek leave to file the attached Amended Complaint.

Dated: December , 1991

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 91-2653-Civ-Atkins

THE HAITIAN REFUGEE CENTER, INC. a Florida not-for-profit Corporation, and ROLAND PROVIDENCE, MOISE CHARLES, ERIC PIERRE, RAYMOND EDME, GOLBERT MIRACLE, ROLAND JEAN, ROOSEVELT ALEXIS, LUC LUXEMBOURG SANON, LEGER PIERRE FRANTZ, OCHEL ENGERRIL, JEAN MICHEL MARIO AVILUS, ARCHILLE BELVU, LUCIEN ROZIER, EMMANUEL SAINTIL, CONDANSER JOSEPH on behalf of themselves and all others similarly situated, PLAINTIFFS,

-against-

JAMES BAKER, III, Secretary of State, REAR ADMIRAL ROBERT KRAMEK and ADMIRAL KIME, Commandants, United States Coast Guard, GENE MCNARY, Commissioner, Immigration and Naturalization Service, The United States Department of Justice, Immigration and Naturalization Service, and the United States, DEFENDANTS

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF CLASS ACTION

Plaintiffs the Haitian Refugee Center, Inc. ("HRC"), and Roland Providence, Moise Charles, Eric Pierre, Raymond Edme, Golbert Miracle, Roland Jean, Roosevelt Alexis, Luc Luxembourg Sanon, Leger Pierre Frantz, Ochel Engerril, Jean Michel Mario Avilus, Archille Belvu, Lucien Rozier, Emmanuel Saintil, Condanser Joseph, on behalf of themselves and all others similarly situated, by their undersigned attorneys, as and for their complaint, allege as follows:

1. This is a complaint for declaratory and injunctive relief arising from the interdiction by the United States Coast Guard of Haitian vessels and their passengers on the high seas, from denial of access to said passengers held aboard Coast Guard cutters or at the Guantanamo Naval Base by the Haitian Refugee Center, Inc. ("HRC"), its attorneys, employees, and members, and from the failure of defendants to follow INS rules and relevant statutes protecting the potential POLITICAL asylees among those passengers from forcible return to Haiti.

2. Under an "interdiction program," the Coast Guard and the Immigration and Naturalization Service ("INS") intercept vessels on the high seas believed to be carrying Haitian aliens, many of whom meet the standard for political asylum and who seek refuge in our country. The Executive Order authorizing interdiction, Executive Order 12324, titled "Interdiction of Illegal Aliens," FR Doc. 81-28829, 46 Fed. Reg. 48109 ("Executive Order"), does not permit the forcible return of refugees. Pursuant to this order, the INS has promulgated guidelines designed to ensure the identification and protection of refugees.

3. In the aftermath of a September, 1991, military coup in Haiti, the Coast Guard has intercepted numerous vessels containing approximately 5000 Haitians as of December 1, 1991, many of whom are fleeing for their lives. This lawsuit seeks access by the HRC, its attorneys, employees, and members, to the Haitian plaintiffs detained at the Guantanamo Naval Base and on Coast Guard Cutters in order to advise these plaintiffs many of whom are members of HRC, of their rights in the asylum process and of HRC's interest in providing representation and assistance to them in furtherance of its organizational goals. In addition, HRC seeks to assure that such plaintiffs have a full and fair opportunity to present the merits of their asylum claims and that such claims are determined by defendants in accordance with the Executive Order, the INS Guidelines, the immigration statute, the

Administrative Procedure Act, the U.N. Convention and Protocol for the Status of Refugees, and other legal requirements. Plaintiffs invoke the Court's equitable powers to ensure that our laws are complied with and that those plaintiffs having legitimate asylum claims are not returned to Haiti.

Jurisdiction and Venue

4. Plaintiffs' claims arise under the Immigration and Nationality Act, 8 U.S.C. Sections 1101(a)(43), 1158, 1253(h), the Refugee Act of 1980, 8 U.S.C. Section 1521 note, and regulations promulgated thereunder, the Administrative Procedure Act 5 U.S.C. §§ 551 *et seq.*, the First Amendment to the United States Constitution, the United Nations Protocol Relating to the Status of Refugees, the Universal Declaration of Human Rights, and principles of international law and jurisdiction is based on 28 U.S.C. § 1331, as a civil action arising under the Constitution, laws, or treaties of the United States, and 8 U.S.C. § 1329, as a civil cause arising under the Immigration and Nationality Act, as amended.

5. Venue is proper in this district under 28 U.S.C. Section 1391(e), as some defendants in the action reside here, a substantial part of the events or omissions giving rise to the claim occurred here and some plaintiffs reside in this district. No real property is involved in this action.

6. Plaintiffs, by their attorneys, bring this action for injunctive and declaratory relief pursuant to Rules 65 and 57 of the Federal Rules of Civil Procedure.

Parties

7. Plaintiff, HRC is a non-profit membership corporation located in Miami, Florida. The HRC's purpose, as set forth in its bylaws is to promote the well-being of Haitian refugees through appropriate programs and activities, including legal representation of Haitian refugees, education regarding legal and civil rights, orientation, acculturation, and social and referral services. It has brought substantial lawsuits challenging procedures and practices of the INS in processing Haitian refugee applications and has been recognized by the INS as a source of legal counsel for indigent Haitians.

8. The HRC's membership includes United States citizens, resident aliens and non-resident aliens, including the Haitian plaintiffs and the class they represent. From its inception, the HRC's membership has included Haitian refugees seeking political asylum in the United States.

9. Plaintiff, Roland Providence, is a Haitain refugee who was picked up at sea by United States Coast Guard cutter. Since 1987, he was a group leader for Ti Legliz. Providence led group discussions in churches and disseminated information supporting Aristide in his local church. He was a member of the FNCD, and a delegate monitoring polling places during the 1990 election. After the coup, Providence went into hiding where he learned from his brothers that the military shot up his house looking for him. He fled the country. Providence was interviewed for only four or five minutes by a Haitian woman (not through a translator) who was unsympathetic, did not ask what Ti Legliz was (although Providence told her he was a member), and who pressured and rushed him through the interview. The interviewer did not give Providince a chance to tell what happened to him in any detail. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

10. Plaintiff, Moise Charles, is a Haitian refugee who was picked up at sea by Coast Guard Cutter. Moise

Charles, president of the Ansa Rouge Coordination Association was also a polling place observer for Aristide's party in the 1990 presidential election. Despite his political activities, he was neither asked about, nor able to assert, his political affiliations during his five minute INS interview. Prior to departing Haiti, two military personnel and one civilian came to his home to arrest him. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

11. Plaintiff, Eric Pierra, is a Haitian refugee who was picked up at sea by Coast Guard Cutter. Eric Pierra was a member of the FNCD (National Front for Change to Democracy), the political coalition supporting Aristide. Prior to his departure from Haiti, he was warned by some relatives that the army was about to arrest him. The army had previously been to his home and sprayed it with bullets, killing his father. Plaintiff Pierra was barely questioned during his INS "interview" and was not specifically asked about his participation in the FNCD. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

12. Plaintiff, Raymond Edme, is a Haitian refugee who was picked up at sea by a United States Coast Guard Cutter and is presently on board the U.S.S. Courageous. He advised the INS interviewer, during his twelve minute interview (including time for translation), which plaintiff describes as "rushed," that he was a member

of the AJN (a neighborhood youth organization) and that his brother, who had been taken, "screened-in," and taken to Miami, was president of the AJN. The interviewer never inquired what the AJN was, or what the plaintiff's brother's name was. Prior to his departure from Haiti, and immediately after the coup occurred, he was advised that the military had come to arrest him. Plaintiff and his brother immediately left Haiti. Plaintiff was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

13. Plaintiff, Golbert Miracle, is a Haitian refugee picked up at sea by the United States Coast Guard. Miracle, his mother, and his aunt all resided together and all worked as "mandats" (local representative) of the FNCD (National Front for Change to Democracy). On November 8, 1991 about twelve soldiers came to their home. Miracle's mother was in the courtyard in front of the home and was immediately shot to death by the soldiers. Miracle's aunt and sisters were arrested and their whereabouts are unknown. Miracle left Haiti on the next day. He was interviewed on board the cutter by two persons for approximately three minutes. Before the interview began, the interpreter advised Miracle that everyone was claiming political problems and that, no matter what he said, he would be returned to Haiti. Nonetheless, Miracle attempted to tell all that he could in the three minutes the INS granted him. Miracle has a father who is a permanent resident in Miami.

14. Plaintiff, Roland Jean, is a Haitian refugee picked up at sea by the United States Coast Guard. Jean was a member of the "Komite Ti-Legliz" (Committee of Small Churches) which is a large organization of commu-

nity based Catholic Churches working with and educating the poor. The Ti Legliz constitute an important segment of national support for Aristide. Jean also serves as a "mandat" for the FNCD. On November 5, 1991, police forcibly entered Jean's home and arrested his father, a known Aristide supporter. Jean managed to escape arrest and fled Haiti. Jean was "screened-out" after a five minute interview. During the interview, the INS interpreter belittled his claim to asylum and informed him that he was going to be returned to Haiti, inexplicably because he had engaged in conduct which was disrespectful of the Haitian military authorities. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

15. Plaintiff, Roosevelt Alexis, is a Haitian refugee who was picked up at sea by the United States Coast Guard. During a political meeting on November 5, 1991 the military stormed the meeting hall and killed several members of his group. The military hunted him down and chased him to his home. He escaped, but the military killed his mother and father. During his INS interview, he was tired and weak. While explaining his reasons for leaving Haiti, the interviewer acted in a rude manner, telling Alexis that he could "jump up and down," but would still be sent back to Haiti. The interview lasted five minutes. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

16. Plaintiff, Luc Luxembourg Sanon, is a Haitian refugee who was picked up at sea by the United States Coast Guard. He was an ardent supporter of Aristide and attempted to organize a demonstration in support of Aristide's return. The military was after Sanon for his efforts supporting Aristide. He was interviewed for about fifteen minutes during which the interview was constantly interrupted. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

17. Plaintiff, Leager Pierre Frantz, is a Haitian refugee who was picked up at sea by the United States Coast Guard. Military officers arrested him at his home because of his support for Aristide. He managed to escape and fled the country. He was interviewed for four or five minutes. He was afraid to talk because he did not trust the interviewers. He did not know whether the interviewers would turn the information over to the illegal government in Haiti. He was sick and exhausted during the interview. Two days after being interviewed he collapsed from fatigue and required medical attention. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

18. Plaintiff, Ochel Engerril, is a Haitian refugee picked up at sea by the U.S. Coast Guard. He was a strong supporter of the FNCD and Aristide. His brother was shot to death after the coup by army soldiers. His home was destroyed by the army. He fled his home and Haiti fearing for his life. He was interviewed by two women aboard a cutter for about fifteen minutes. They

never informed him who they were or why they were interviewing him. He was physically exhausted during the interview. He did not tell and was not asked about his brother's being killed or his home being destroyed. He was not ask questions about these subjects. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

19. Plaintiff, Jean Michel Mario Avilus, is a Haitian refugee picked up at sea by the United States Coast Guard. Avilus formed a group after the coup that discussed politics and the overthrow of Aristide. The group met at his home. He was advised by friends that his name was on a list of persons targeted by the illegal government in Haiti. He and his group left Haiti. Avilus was rushed through his INS interview and was not given a fair opportunity to plead his case for asylum. Avilus told the interviewer about the list and the military wanted to kill him. He attempted to tell the interviewer even more but the interviewer cut him off and stopped the interview. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

20. Plaintiff, Archille Belvu, is a Haitian refugee picked up at sea by the United States Coast Guard. Belvu was the Secretary General of a peasant labor union and a member and representative of the FNCD. Belvu escaped arrest and fled Haiti. He was interviewed for 5-7 minutes and was not told the purpose of the interview. He did not know who was interviewing him. When he said that he left because of the political crisis, the

interpreter became very angry with him. She said that everyone was saying that they left because of politics. The interviewer argued and cursed him. Belvu did not tell the interviewer that he was a member of the FNCD because of the interviewer's reaction. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

21. Plaintiff, Lucien Rozier, is a Haitian refugee who was picked up at sea by the United States Coast Guard. He was a member and representative of the FNCD, campaigned extensively for Aristide, and was well known for his political activities. After the coup, soldiers searched for Rozier. He fled Haiti and his boat was interdicted by the Coast Guard. Rozier spent nine days on board the cutter during which time he was unable to sleep because of horrendous conditions. He wa[s] interviewed for almost twenty minutes. He was scared by the interviewer, not told who was interviewing him, or the reason for the interview. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

22. Plaintiff, Emmanuel Saintil, is a Haitian refugee picked up at sea by the United States Coast Guard. He was a founding member of a human rights organization which sought to insure human rights to Haiti's poor. He actively participated in meetings with Aristide, and was an FNCD delegate during the elections. The military was searching for him and killed his father. He was interviewed for approximately four minutes and was not

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permitted to go into any detail with the interviewer. He fears being killed upon his return to Haiti. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

23. Plaintiff, Condanser Joseph, is a Haitian refugee who was picked up at sea by the United States Coast Guard. He was a founding member of an organization that advocated political change in Haiti and an Aristide supporter. The military came to his home after the coup, killed his younger brother and search[ed] for Joseph. He was asked several questions during a three minute interview. Despite assertions that the military was after him and that he feared being killed if returned to Haiti, the interviewer did not ask any follow-up questions. Joseph told the interviewer that he had family members victimized and killed. Still there were no follow-up questions. Joseph had no idea why he was being questioned or who was questioning him. He did not have the opportunity to explain why he left Haiti. Joseph felt that any explanation would have been useless because he knew he would be returned regardless of the answers he gave. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

24. The individual plaintiffs who are presently aboard vessels intercepted by the Coast Guard or detained at the Naval base in Guantanamo Bay also represent other similarly situated persons who seek, and are entitled to seek, refugee status in the United States. They wish to avoid forcible return to Haiti, where they face the risk

of unlawful arrest, detention, persecution and possible death. The HRC also considers the above named plaintiffs and similarly situated persons to be members of HRC by virtue of their presence on territory within the control of the United States such as the Naval Base at Guantanamo Bay and Coast Guard Vessels. Upon information and belief, the Haitians detained at Guantanamo are on non-military portions of the base. The intercepted Haitians are entitled to seek effective assistance from the HRC, and likewise, the HRC would assist the interdicted Haitians regarding their desires to seek refugee status if permitted to do so by defendants.

25. The individual plaintiffs on behalf of themselves and all others similarly situated on the intercepted vessels and at land based centers to which they have been taken are, by the current operation and implementation of the interdiction program, unable to secure protection against refoulement without a spokesperson. HRC seeks to represent these members' interests in this lawsuit. HRC has been denied, and continues to be denied in its own right, the ability to provide effective representation to its interdicted members.

26. Defendants Kramek and Kime are Commandants of the United States Coast Guard. Other Coast Guard officers who are implementing the interdiction program are acting under their direction and command. These defendants are being sued in their official capacity.

27. Defendant Gene McNary is the Commissioner of the INS. The INS officers on board the Coast Guard cutters are acting under his direction and supervision. Defendant McNary is being sued in his official capacity.

28. Defendant James Baker, III is the Secretary of State and in that capacity has the final decision making authority within his department. Upon information and belief, it is the State Department that has directed the other United States agencies to forcibly return Haitian refugees. Defendant Baker is sued in his official capacity.

29. Defendant Department of Justice is the agency of the United States with oversight and ultimate responsibility for the enforcement of the immigration laws of the United States.

30. Defendant Immigration and Naturalization Service is the agency charged with the direct responsibility for enforcing the immigration laws of the United States.

31. Defendant The United States is a sovereign and has ultimate responsibility for all of its agencies and officers.

The Interdiction Program

32. On September 29, 1981 the President issued Proclamation 4865, FR Doc. 81-28828, 46 Fed. Reg. 48107 ("the Proclamation"), which announced a program of "interdiction: on the high seas of vessels transporting aliens." The Proclamation purports to authorize the United States Coast Guard to stop and board United States, unregistered, and certain foreign vessels, to make inquiries to determine if their passengers are undocumented migrants bound for the United States, and, if so, to return them to the country from which they came. The Executive Order by its terms limits the government's authority by permitting repatriation *only* of persons who are not refugees.

33. Section 2(c)(3) of the Executive Order instructs the Coast Guard to "return [a] vessel and its passengers to the country from which it came . . . *provided, however, that no person who is a political refugee will be returned without his consent.*" (Emphasis added). The Executive Order thus incorporates the principle of *"non-refoulement"*—a prohibition against forced repatriation of refugees that is embodied in both international and domestic law.

34. The United States is a party to the United Nations Protocol Relating to the Status of Refugees (the "Protocol"), which incorporates the United Nations Convention Relating to the Status of Refugees ("Convention"). Article 3 of the Convention provides that

> No contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion.

Section 243(h)(1) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1253(h)(1), also states that

> The attorney general shall not deport or return any alien . . . to a country if the attorney general determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

35. Both the Convention and the INA define "refugee: as a person who is "outside the country of his nationality" and is "unable or . . . unwilling . . . to return to that country" because of a "well-founded fear of persecution["] on account of "race, nationality, membership in a particular social group, or political opinion." *See* Convention, Art. I; INA § 101(42), 8 U.S.C. § 1101.

36. The Executive Order acknowledges "international obligations" as a basis for expressly incorporating these standards. It states in Section 3 that

> the Attorney General shall . . . that whatever steps are necessary to insure the fair enforcement of our laws relating to Immigration . . . and the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland.

The United States reaffirmed these obligations in a "cooperative agreement" with Haiti regarding the interdiction program. The agreement provides that:

it is understood . . . the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status.

Agreement Effected By Exchange of Notes, signed at Port-au-Prince September 23, 1991, entered into force September 23, 1991.

The INS Guidelines

37. At the inception of the interdiction program, the INS issued "guidelines" intended to establish procedures for identifying and protecting refugees, including:

(a) that INS officers shall be present aboard Coast Guard vessels carrying out the interdiction program;

(b) that such INS personnel "shall be constantly watchful for any indication (*including bare claims*) that a person or persons on board the interdicted vessel may qualify as refugees under The United Nations Convention and Protocol" (emphasis added);

(c) that interviews shall be conducted in conditions, including privacy, designed to ensure full presentation of claims;

(d) that transcription of interviews and other records shall be maintained to facilitate eventual presentation of claims to authorities in the United States/ and

(e) that potential asylees shall be removed from the vessel and provided with passage to the United States. *INS Role In and Guidelines For Interdiction at Sea*, October 6, 1981.

38. The INS did not observe these initial rules. Rather, during the decade following their promulgation, interviews were often as short as five minutes; they were not conducted in private and they were otherwise insufficient as the Haitian emigres on the interdicted vessels often had been deprived of food and water so that they were physically and mentally incapable of then taking

part in an effective interview. As a result of these defective procedures, only 28 of the over 24,000 Haitians on vessels interdicted by the Coast Guard from the inception of the interdiction program in 1981 until mid-1991 were identified by INS officials as potential asylees.

39. In response to complaints about defective procedures, the Justice Department acknowledged, in June 1991, that pre-screening procedures aboard interdicted vessels were faulty. Improvements were to include:

(a) better training of INS personnel and formal certification of Creole interpreters;

(b) more careful briefing of Haitians as to the purpose of pre-screening procedures;

(c) lengthier and more careful interviews;

(d) more thorough documentation of claims and more careful review of such documentation; and

(e) parole for all persons transported to the United States to pursue asylum claims and adjudication of such claims before a member of the Asylum Officer Corps.

The Immediate Events Giving Rise to This Action

40. President Aristide was elected in December 1990 in the first fully democratic elections to take place in Haiti in over 200 years. Before he even took his oath of office he was challenged by an unsuccessful coup. The September 1991 coup was not only successful—it has resulted in a widely publicized reign of terror in Haiti. On information and belief, in the past two months several thousand Haitians, many of them supporters of the Aristide government, have been killed or subjected to violence and destruction of their property, producing fear and desperation throughout the country.

41. In the wake of this chaos and mass violence, thousands of Haitians have sought to escape by sea. They have resorted to boats that are overloaded, unseaworthy, lacking basic safety equipment, and operated by inexperienced persons.

42. According to the government's own figures, more Haitians have left Haiti in the past month than in any prior month.

43. On information and belief, pursuant to the Executive Order, United States Coast Guard cutters have been on patrol in the international waters of the Windward Passage near Haiti since prior October 9, 1981 in response to the coup. On or about October 29, 1991, Coast Guard vessels began to interdict vessels carrying emigres fleeing from Haiti. To date, approximately 19 such vessels have been intercepted and more than 5000 emigres on these vessels are detained.

44. INS officials have reported that only twelve asylum officers, and nine interpreters, have been assigned to interview the interdicted Haitians. According to INS officials, interviews of some of the Haitians consisted of as little as 5 or 10 minutes of questioning concerning the Haitians identity and whether there was any reason they could not go back to Haiti, and much of that time was interpretation. The interviews were not conducted in privacy or consistent with other conditions provided by guidelines, and were otherwise insufficient given the conditions under which the interviews took place. Many Haitians have language and illiteracy deficits, and are socially and culturally conditioned to be unduly responsive to suggestive influences, particularly from authority figures such as the defendant officials who conducted the interviews. Several of the Haitians, including babies, children, and pregnant women, were ill and had high fevers at the time they were interviewed. Many were seasick, having spent several days at sea in rough waters. The Haitians were exposed to extreme temperatures on the deck of the Coast Guard vessels, where they were not sheltered or only partially sheltered, from sun, rain, wind and cold. Many of the Haitians were exhausted, and were in too much physical and mental distress to understand the import of the interviews or become aware of their rights.

45. The Haitians were interviewed without benefit of counsel and without being advised of their rights or of the nature and reason for the interviews. The interviewers were largely inadequately trained and supervised. Many were unaware or insufficiently aware of the prevailing conditions in Haiti. Moreover, the actual decision to screen-in or screen-out Haitians for further processing of a possible asylum claim in the United States was made by officials in Washington, D.C. or Miami, Florida who had no adequate means in most cases of assessing whether the interviewee had a "credible" fear of persecution. Those reviewing the statements taken by the interviewers in Washington, Miami or Guantanamo were also insufficiently trained and informed about conditions in Haiti at the time. On information and belief, some of the interviewers and reviewers were value biased or overly influenced by official government views concerning conditions in Haiti and thus were not neutral and detached decision makers. Additionally, the interviewers failed to reveal their biases and reliance upon facts outside the hearings to the interviewees, and failed to provide them with an opportunity to rebut or refute the biases and reliance on outside factors, or to make them part of the administrative record.

46. The interviews of the Haitian plaintiffs were conducted in a chaotic and uneven way. On information and belief, defendants have recently restructured the interview process and will conduct future interviews on land-based facilities rather than on the area. Defendants have maintained inadequate record-keeping concerning interviews, with the result that it is difficult or impossible to identify which individuals were interviewed and by whom, and impossible to ascertain this information on request.

47. The interviewees were compelled to appear in person before the interviewers without having any opportunity to be represented, accompanied, or advised by anyone knowledgeable.

48. One result of using defective procedures is the low rate of screen-ins for further processing. On information and belief only about 3% of the intercepted Haitian aliens were found to have stated a sufficient case to lead to further asylum processing in the United States.

49. Guantanamo Naval base and the Coast Guard cutters are the functional equivalents of United States territory. The lease of the Guantanamo Base provides that "during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said area. . . ."

50. On November 18, 1991, defendants announced that it had commenced the forcible return of these people to Haiti, notwithstanding the evident inadequacy of INS efforts to identify potential asylees with any degree of procedural regularity and inevitably with a diminished degree of accuracy. Without this court's equitable relief, the government intends to return all those "screened out" to Haiti.

COUNT I

First Amendment Violations

51. Plaintiff repeats and realleges paragraphs 1 through 50 as though fully set forth herein.

52. The denial of access to the emigrees on Coast Guard cutters and at Guantanamo Naval base violates the rights of the individual plaintiffs and the class they represent and of HRC, whose organizational purpose has been thwarted in that it has been unable effectively to provide assistance to the refugees including legal assistance and information concerning their legal rights. These unlawful actions violate plaintiffs' freedom of speech and the right of association and to access to the public forum of the court, all protected by the First Amendment to the United States Constitution, and § 555(b) of the Administrative Procedure Act.

COUNT II

Procedural Violations

53. Plaintiff repeats and realleges paragraphs 1 through 52 as though fully set forth herein.

54. In the Executive Order, the United States explicitly concedes its international obligations with respect to refugees govern its conduct of the interdiction program, regardless of the location of these refugees outside the territory of the United States. Pursuant to the Executive Order, the INS has promulgated guidelines setting forth specific procedural requirements designed to ensure, in conformance with these international obligations, the identification and protection of refugees intercepted on the high seas.

55. The United States is a party to the United Nations Protocol Relating to the Status of Refugees ("the Protocol") which substantially incorporates the United Nations Convention relating to the Status of Refugees ("the Convention"). Article 33 of the Convention prohibits "*refoulement*", or the forced return, of persons to a country where their "life or freedom would be threatened on account of membership in a particular social group or political opinion." Article 3 of the Convention provides that its provisions are to be applied "to refugees without discrimination as to race, religion or country of origin."

56. The United States has also acceded to the United Nations Charter, which provides in Articles 55 and 56 for the promotion of fundamental human rights. In accordance with this article the General Assembly of the United Nations unanimously adopted on December 10, 1948, the Universal Declaration of Human Rights ("the Declaration"). Article 13 of the Declaration states that "[e]veryone has the right to leave any country, including his own . . . ." Article 14 states that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution."

57. In addition, the Executive Order requires the INS to "ensure the fair enforcement of our laws relating to immigration," and the guidelines promulgated pursuant to this requirement provide potential asylees with transportation to the United States for the explicit purpose of asserting their rights under the immigration laws.

58. The United States immigration laws which are being enforced in the interdiction program include the Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 ("Refugee Act"), which states that "it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands." 8 U.S.C. § 1521. Pursuant to the Refugee Act, uniform procedures have been established by regulation under which applicants for refugee status are given opportunities to state their claims fully in writing, to adduce evidence supporting their claims, to have their claims reviewed and supported by the State Department's Bureau of Human Rights and Humanitarian Affairs and not to be returned to territories where they face persecution.

59. Further under the Immigration and Nationality Act, 8 U.S.C. § 1253(h), an alien may not be returned to a country where he will face threats to life or freedom on account of race, religion, nationality, membership in a particular social group, or political opinion. Pursuant to the Immigration and Nationality Act, procedures have been established that enable aliens asserting a claim for asylum to a hearing before an Immigration Judge, an appeal from his decision and the assistance of counsel in those proceedings.

60. Defendants' actions in conducting interviews of the Haitian plaintiffs and in "screening-out" many of them violate the procedural requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 555 (b), 556, 557, 558 and 702. The Haitian plaintiffs, who are "persons" within the meaning of the APA, 5 U.S.C. § 551. Because of the failure of defendants to follow the

procedural requirements of the APA, they have made flawed determinations of the merits of the Haitian plaintiffs' substantial claims for asylum.

61. Defendants' failure to comply with INS guidelines and the procedural requirements of the Administrative Procedure Act has harmed, and, unless enjoined, will continue to harm plaintiffs and the members of the class they represent who are fleeing persecution and seeking asylum in the United States and who have been intercepted by the Coast Guard pursuant to the Interdiction Program. By failing to comply with INS guidelines, defendants have deprived the intercepted plaintiffs and the members of the class they represent of their procedural rights under the Executive Order, the Refugee Act, th Administrative Procedure Act, the INA and international law. The intercepted plaintiffs and the class they represent have no adequate remedy at law.

CLASS ACTION ALLEGATIONS

62. Haitian plaintiffs bring this action pursuant to Rule 23(a) and (b)(1)(2) on behalf of themselves and all other persons similarly situated. The class consists of the following presently ascertainable members:

(a) All Haitian refugees who are currently detained or who in the future will be detained on United States Coast Guard cutters and at Guantanamo Naval Base or elsewhere who were or will be interdicted on the high seas pursuant to the United States Interdiction Program and who are asserting violations of their First Amendment and procedural rights.

63. Defendants have acted or threatened to act on grounds generally applicable to each member of the class, thus making final declaratory and injunctive relief with respect to the class, as a whole, appropriate.

64. The plaintiffs are adequate representatives of their class because they have been subjected to or threatened with policies and procedures that are identical with the

policies and procedures that the members of their class have been subjected to or are threatened with, and because like members of their class, they seek declaratory and injunctive relief protecting their rights under the First Amendment, the Administrative Procedure Act, the immigration statute and regulations, the Protocol and other provisions of law.

65. A community of interest exists between plaintiffs and members of their class in that there are questions of law and fact which are common to all. They seek a determination of whether or not the practices and procedures of defendants are consistent with the APA, with the immigration statute, with INS Regulations, with the Protocol, with the Constitution, and with other provisions of law.

66. Individual suits by each member of the class would be impracticable because:

(a) There exist common and identical issues of law and fact for all members of the class; whether the policies and procedures of defendants with respect to exclusion violate INS Guidelines, Regulations and Statutes, the APA, the Protocol, the Constitution, and other provisions of law.

(b) The number of suits would impose an undue burden upon the courts.

(c) Many members of the class are unaware of their rights and/or are intimidated, due to their status as aliens.

67. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

68. No administrative remedies under the Immigration and Naturalization Act exist which remain to be exhausted that would not be futile or that would provide the relief sought herein. Those members of the class already "screened-out" have been subjected to final agency action.

69. No independent litigation has, as of the time of filing this suit, been brought by any member of the class against defendants as to the issues raised in this complaint.

70. Plaintiffs' counsel are experienced in class action litigation and can adequately represent the interests of class members as well as the named plaintiffs.

RELIEF SOUGHT

WHEREFORE, plaintiffs respectfully request the Court to grant the following relief against defendants and their successors in office:

(a) Certification of the class;

(b) Declaratory relief that the defendants' practices in forcibly returning Haitian refugees to Haiti under these circumstances would violate the terms of Executive Order 12324, the guidelines promulgated pursuant to the Executive Order, the interdiction treaty between the United States and Haiti, the Refugee Act of 1980, the Immigration and Nationality Act Sections 101(a)(43), 208 and 243(h), the APA, the United Nations Protocol Relating to Status of Refugees, the First and Fifth Amendments to the United States Constitution and other provisions of law;

(c) Setting aside the denial of asylum claims or the agency action "screening-out" members of the plaintiffs' class as being arbitrary and capricious, not in accordance with law, and not in accordance with procedural requirements;

(d) Preliminary and permanent injunctive relief ordering defendants to refrain from sending back to Haiti these Haitians who have not been identified as candidates for asylum until such time as procedures are implemented and followed which adequately protect and recognize the rights of these persons under the Executive Order, the INS guidelines promulgated pursuant thereto, the APA,

international law, as well as the privileges ordinarily afforded potential refugees under the Refugee Act of 1980 and the Immigration and Nationality Act, and preliminary and permanent injunctive relief granting HRC reasonable access to the persons interdicted by the defendants whether on Coast Guard cutters or at Guantanamo Naval Base or elsewhere; and

(e) Such other and further relief as the Court may deem just and proper, including reasonable attorneys' fees and costs.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title Omitted in Printing)

MOTION TO MAINTAIN THE AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AS THE CLASS ACTION ON BEHALF OF PLAINTIFFS

Pursuant to Rule 23 of the Federal Rules of Civil Procedure and Rule 19 of the Local Rules of the United States District Court for the Southern District of Florida, the plaintiffs by and through their undersigned counsel, request that this Court determine that the Amended Complaint for Declaratory and Injunctive Relief insofar as it pertains to plaintiffs may be maintained as a class action. Plaintiffs seek a class that:

> Consists of all Haitian aliens who are currently detained or who in the future will be detained on U.S. Coast Guard cutters or at Guantanamo Naval base who were interdicted on the high seas pursuant to the United States Interdiction Program and who are being denied First Amendment and procedural rights.

In support of this Motion, plaintiffs have alleged sufficient class action allegations in their Complaint, have submitted a Memorandum of Law which although pertaining to petitioners is applicable in many respects to plaintiffs and will submit a Supplemental Memorandum of Law pertaining to the plaintiffs' class.

Dated: December , 1991

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title Omitted in Printing)

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE SUPPLEMENTAL PLEADING AND SECOND AMENDED COMPLAINT

Plaintiffs submit this Memorandum of Law in support of their Motion ("Motion") for leave to file their Supplemental Pleading and Second Amended Complaint ("Amended Complaint").

SUPPLEMENTAL PLEADING

Fed. R. Civ. P. 15(d) authorizes the court to permit the filing of a supplemental pleading "setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." The original complaint was filed on November 19, 1991 to challenge the defendants' change in policy (occurring on November 18, 1991) concerning the return of Haitian asylees. Following communications with defendants, the complaint was amended to add first amendment claims then apparent. Following discovery as ordered by the District Court to occur beginning on November 21, 1991, individual plaintiffs have come forward to assert additional claims against the defendants.

Thus, 15 new parties are added and allegations concerning them are made with respect to occurrences or events which have happened since the filing of the Amended Complaint.

"The purpose of a supplemental pleading"—plainly served in this case—"is to bring a controversy up to date; to introduce newly-occurring facts enlarging or changing the relief sought in the original complaint."

Moore's Manual Federal Practice and Procedure § 9.09 [10] at 9-44. The fact that additional individual plaintiffs are added is not improper, as "the Supreme Court has sustained the use of Rule 15(d) to add additional parties where the events that transpired since the commencement of the action warranted such additions." *Moore's Manual Federal Practice and Procedure* § 9.09 [10], at 9-44 to 9-45; *e.g., Griffin v. School Board of Prince Edward County*, 377 U.S. 218 (1964).

AMENDMENT

Leave to amend a complaint under Rule 15, Fed. R. Civ. P., falls within the sound discretion of the trial court. *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321 (1971); *Foman v. Davis*, 371 U.S. 178 (1962). Rule 15(a) directs that "leave shall be freely given when justice so requires" and amendments as a general matter are favored in order to "facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41 (1957); *Borden v. Florida East Coast Railway*, 772 F.2d 750 (11th Cir. 1985) (There is a strong policy embodied in the Federal Rules of Civil Procedure favoring the liberality of amendment); *Andujar v. Rogowski*, 113 F.R.D. 151 (S.D.N.Y. 1986) (migrant worker's motion to amend complaint to add plaintiffs properly granted).

HRC may add additional plaintiffs under Rule 21, Fed. R. Civ. P. The Court possesses broad discretion under Rule 21 to permit adding additional parties at any stage in the litigation. 7, Wright & Miller, *Federal Practice and Procedure*, § 1688 (2d ed. 1986) The liberal standards upon which amendments are to be granted to pleadings when leave of court is required also govern the trial court in resolving motions to add parties. *Rollins Burdick Hunter of Wisconsin v. Lamberger*, 105 F.R.D. 631 (E.D. Wisc. 1985).

Under either authority, absent undue delay, bad faith, prejudice to the opposing party, or futility of the amendment, leave to amend should be freely granted. *Forman v. Davis*, 371 U.S. 178 (1962).

HRC seeks to add individual plaintiffs Roland Providence, Moise Charles, Eric Pierre, Raymond Edme, Golbert Miracle, Roland Jean, Roosevelt Alexis, Luc Luxembourg Sanon, Læger Pierre Frantz, Ochel Engerril, Jean Michel Mario Avilus, Archille Belvu, Lucien Rozier, Emmanuel Saintil and Condanser Joseph. All of the plaintiffs' claims arose out of the same occurrences; interdiction at sea by the U.S. Coast Guard. Additionally, the defendants will not suffer any prejudice by the addition of plaintiffs. The defendants have not yet filed a responsive pleading and have been fully aware, from the onset of the action, of the existence of the potential additional plaintiffs and of HRC's intent to add them at an appropriate time when authority to do so could be established.

Moreover, an amendment adding parties, substituting new parties or changing the capacity of the plaintiff is as permissible, *Moore's Manual Federal Practice and Procedure* § 9.09 [3], at 9-32, as is the addition of new subclasses or the redefinition of classes in a class action, or even the conversion of an individual action to a class action. *E.g., Zarata v. State Department of Health and Rehabilitative Services*, 347 F. Supp. 1004 (S.D. Fla. 1971).

Since the Amended Complaint will facilitate the presentation of the merits of the action, and will do so in an efficient manner which will not prejudice defendants or cause undue delay, the amendment should be freely permitted.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title Omitted in Printing)

MEMORANDUM IN SUPPORT OF MOTION FOR CLASS ACTION CERTIFICATION

The Plaintiffs, by and through their undersigned counsel, submit this Memorandum in Support of their Motion to Maintain the Amended Complaint for Declaratory and Injunctive Relief as a Class Action on Behalf of Plaintiffs, filed on December —, 1991. As amended, the Amended Complaint adds 15 new parties—plaintiffs, Roland Providence, Moise Charles, Eric Pierre, Raymond Edme, Golbert Miracle, Roland Jean, Roosevelt Alexis, Luc Luxembourg Sanon, Leger Pierre Frantz, Ochel Engerril, Jean Michel Mario Avilus, Archille Belvu, Lucien Rozier, Emmanuel Saintil and Condanser Joseph, presently detained on Coast Guard cutters or at Guantanamo—who are all presently members of the class and in every respect fairly and adequately represent the interests of the class.

I. DEFINITION OF THE CLASS

The individual plaintiffs are all Haitian emigres who were intercepted by the United States Coast Guard pursuant to a "program of interdiction" that permits interception and repatriation of undocumented aliens. They are presently being held on Coast Guard cutters and at the U.S. Naval base in Guantanamo. They have all been "screened out" and thus are injured by the failure of the INS to observe rules and procedures designed to ensure that no person who is a political refugee will be returned without his consent. Effectively, as a result, each of these plaintiffs would be forcibly returned to

Haiti facing possible imprisonment and death were it not for the Court's order. They are all seeking a fair determination of their claim to political asylum and seek the assistance of the Haitian Refugee Center in processing those claims.

All 15 plaintiffs were subjected to the failure of the defendants to comply with INS guidelines for screening asylum claims. They were all denied procedural rights under the Executive Order of the INS guidelines. They were all denied rights under the Immigration and Nationality Act not to be returned to the country which threatens their life or freedom on account of their race, religion, nationality, membership in a particular social group, or political opinion. They were also all denied the rights under United Nations Protocol Relating to the Status of Refugees prohibiting forced return of refugees. All 15 plaintiffs were also subject to the defendants' practices of denying the HRC access in violation of their First Amendment rights of association.

The named plaintiffs seek to represent the class and persons similarly situated, to wit, Haitian refugees who: (1) are or will be detained aboard United States Coast Guard cutters currently in the high seas; (2) who are or will be held in detention at the U.S. Naval base at Guantanamo Bay; and (3) who are or will be denied their First Amendment and procedural rights to implementation of the INA's procedures for screening potential asylees.

As defined, this class action will involve approximately five thousand (5000) or more persons. The exact number of persons, as well as their names, alien registration numbers, and addresses or exact location, can be ascertained from the records of defendants.

Thus, the proposed class is sufficiently identifiable and defined for class action treatment.

II. THE PREREQUISITES OF RULE 23(a) TO MAINTAIN A CLASS ACTION ARE SATISFIED HERE

The prerequisites of a class action are: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

A. *The Class Is So Numerous That Joinder Of All Members Is Impracticable*

The proposed class consists of approximately five thousand or more persons, each of whom has been or will shortly be treated in a virtually identical manner by defendants with respect to their denial of First Amendment rights and of their procedural rights under INS guidelines and other sources of law. These policies and procedures have been adopted and implemented by defendants against plaintiffs as a class.

Evidence has already shown that members of the proposed class are poor, illiterate, unfamiliar with legal procedures, fearful of making claims against the authorities of the government, and unfamiliar with the English language. In light of the large number of indigent persons similarly situated, a class action is the only practicable procedural method for presentation of the claims asserted in the present litigation. The number of persons would render joinder an ineffective substitute for a class action. Additionally, failure to certify this class would result in untold hardship to the individual refugees who are indigent, illiterate, unfamiliar with and intimidated by legal procedures and litigation, and in detention with facing possible repatriation leading to potential loss of life and freedom. As a result, they are unable to assert their rights, absent class certification, and would face

imminent return and possible imprisonment and death in Haiti.

On these facts, class certification is thus particularly appropriate. The courts have long recognized the function of the class action mechanism as providing a forum and relief for claims which otherwise would not be enforced. *Nely v. United States*, 546 F.2d 1059, 1071 (3d Cir. 1976). The courts have stressed the lack of knowledge and sophistication of class members, and the need for their protection, as a basis for finding the class action mechanism appropriate. *E.g., City of New York v. International Pipe and Ceramic Corp.*, 410 F.2d 295 (2d Cir. 1969); *Gordon v. Forsythe Co. Hospital Authority, Inc.*, 409 F. Supp. 708, 717 (N.D.N.C. 1976). Class action is thus particularly appropriate where, as here, class members are ignorant of their rights or incompetent to assert them. *E.g., United States, ex rel. Morgan v. Sielaff*, 546 F.2d 218, 222 (7th Cir. 1976). ("Ignorance or illness.") *Addarly v. Wainwright*, 46 F.R.D. 97, 99 (N.D. Fla. 1968) (functionally illiterate prisoners). Moreover, class certification has been recognized as particularly appropriate where, as here, class members lack access to counsel, *United States ex. rel. Morgan v. Sielaff*, 546 F.2d 218, 111 [*sic*] (7th Cir. 1976) (poverty or lack of counsel); *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161 (7th Cir. 1974) (poverty), or are reluctant to bring individual actions against those with legal authority over them. *Haynes v. Logan Funriture Mart, Inc.*, 503 F.2d 1161 (7th Cir. 1974) (poverty); *STE Marie v. Eastern R.R. Ass'n*, 72 F.R.D. 443, 449 (S.D.N.Y. 1976) (employees of defendant).

B. *There Are Questions Of Law Or Fact Commons Of The Class*

Each member of the proposed class of plaintiffs claims a deprivation of his/her rights based upon virtually identical actions by the Immigration and Naturalization

Service. Plaintiffs are challenging INS policies concerning the screening of potential asylees. Plaintiffs are challenging general policies and practices which have been applied, and which, they allege, will be applied, to all Haitian refugees—policies and practices which have violated the plaintiffs' procedural rights and First Amendment rights under the various regulations, statutes, treaty, Constitutional provisions and international law. This lawsuit is not intended to establish whether any particular refugees have a legitimate claim for asylum or are properly excludable. Rather, it is intended to insure that the government follows appropriate procedures which will provide each individual refugee an effective opportunity to establish his or her claim.

There are thus present both common questions of fact and of law. The cases make clear that either will suffice, and that all questions need not be common questions. *Likke v. Carter*, 448 F.2d 789 (5th Cir. 1971). Where, as here, defendants' "pattern practice or policy" applies across the board, there are common questions of fact provable by evidence common to the class. *Rich v. Martin Marietta Corp.*, 552 F.2d 333 (10th Cir. 1975); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir.) *cert. denied*, 421 U.S. 1011 (1975).

Moreover, there are common questions of law relating to each member of the class For example, the defendants' failure to follow INS guidelines setting forth procedures designed to identify potential asylees equally effects each class member. The forced return of the refugees violates the INS guidelines, the Executive Order and various statutory and Constitutional provisions. These legal issues are common to all plaintiffs, these held on the Coast Guard cutters as well as those held in Guantanamo Bay.

The individual variations in the facts presented, and the outcomes of properly conducted hearings, are simply irrelevant to this lawsuit, the purpose of which is primarily to insure lawful procedural rights. *E.g., Himmler v. Weinberger*, 422 F. Supp. 196 (E.D. Mich. 1976)

(class action appropriate to seek hearings regarding denial of medicare reimbursement, though questions of eligibility for benefits would be individual); *Cicargo v. Olgiati*, 410 F. Supp. 1080 (S.D.N.Y. 1976) (class action appropriate to challeneg parole board procedures "although the Parole Board's decisions in individual cases of course involve facts peculiar to each prisoner").

Indeed, the commonality issue is clearly satisfied because the INS guidelines issued with intention to establish procedures for identity and protecting all refugees applies to all persons interdicted by the Coast Guard pursuant to the interdiction programs.

C. *Typicality of Claims*

The typicality requirement focuses on the individual claim of the class representatives, and requires that it have the essential characteristics common to the claims of the class. *Moore's Federal Practice*, ¶ 23.06-2, at 23-191. The named plaintiffs are adequate representatives of their class because they have been subjected to unlawful policies and procedures that are identical with the unlawful policies and procedures that members of their class have been or will be subjected to, and because, like members of their class, they seek consultation with and access to counsel, an opportunity to apply for political asylum, and enforcement of the INS guidelines. A community of interests exists between plaintiffs and members of their class in that there are questions of law and fact common to all. The 15 added plaintiffs present claims that are in every respect typical of the claims of the class. To the degree that there might be individual differences in fact as to the minute details in the manner in which any of the added plaintiffs or members of their class were treated by defendants, these differences do not negate the fact that the added plaintiffs and the individual members of the class they represent were all subjected to the *same* policies and practices by defendants.

D. *The Plaintiffs Will Fairly And Adequately Represent The Interests Of The Class*

The 15 individual plaintiffs clearly meet the adequacy of representations standard. In any event, the named plaintiffs clearly will fairly and adequately represent the interests of the class. Their claims and interests are in all respects identical to those of the members of the proposed class. None of their claims are moot. Thus, it is apparent that the representative plaintiffs will diligently and fairly protect and pursue the interests of their class. Counsel for the named individuals plaintiffs have been involved in numerous class actions and have repeatedly demonstrated their skill and diligence in presenting class action litigation, including their work thus far in the present action. The ability of plaintiffs to carry this litigation forward to its conclusion, although the individual plaintiffs are indigent, is assured by the support provided by the Haitian Refugee Center, Inc.

III. THIS IS A PROPER CLASS ACTION UNDER RULE 23(b)(2)

Rule 23(b)(2) provides for a class action where the four prerequisites discussed above are met and the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive relief or corresponding declaratory relief with respect to the class as a whole.

The present case results from the acts of defendants toward Haitian refugees who were detained pursuant to the interdiction program. Defendants have acted on grounds generally applicable to all named individual plaintiffs and the members of the class they seek to represent by adopting and applying policies and practices concerning the interdiction of refugees which denied the plaintiffs their First Amendment rights and procedural rights.

The final relief sought is in the nature of injunctive and declaratory relief, settling the legality of defendants' behavior with respect to the class as a whole. See, Notes of Advisory Committee on Rules, 39 F.R.D. 69, 102 (1966). No monetary relief is requested in the present lawsuit. Thus, final declaratory and injunctive relief with respect to the class as a whole is appropriate.

IV. THIS COURT HAS JURISDICTION OVER THE CLASS WHICH PLAINTIFFS REPRESENT

Each member of the proposed class meets the jurisdictional requirements alleged in the Amended Complaint.

V. CONCLUSION

Plaintiffs submit that this action fulfills all the requirements for certification as a class action under Fed. R. Civ. P. 23(a) and 23(b)(2), and that it is proper for this Court to permit the Amended Complaint to be maintained as a class action for the reasons set forth herein. This Court should therefore certify the class so that the action may proceed on behalf of all Haitiain aliens currently detained on U.S. Coast Guard cutters or at Guantanamo Naval Based who are being denied their procedural and First Amendment rights.

Dated: December , 1991

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DEFENDANTS' EXHIBIT NO. 119

(Declaration of John W. Cummings, and Exhibits A-L thereto).

DECLARATION OF JOHN W. CUMMINGS

I, John W. Cummings, declare as follows:

1. I have been employed by the Immigration and Naturalization Service (INS) since April of 1978. I am currently the Acting Assistant Commissioner for Refugees, Asylum and Parole. I am responsible for implementing the laws, rules, and regulations pertaining to the Refugee Program, the Asylum Program, and the Parole Program.

2. In 1981, pursuant to Presidential Proclamation Number 4865, September 29, 1981, and Executive Order Number 12324, September 29, 1981, the United States government began high seas interdiction of illegal aliens. See Exhibits A and B, Presidential Proclamation and Executive Order. The program was implemented in 1981 and guidelines and procedures were promulgated. See Exhibit C, Meissner memo. This program was known as the Alien Migrant Interdiction Operation (AMIO) but is now referred to as the asylum pre-screening program.

3. On September 24, 1982, INS issued guidelines for interdiction at sea that superseded the guidelines that were issued when the program was first implemented. See Attachment D, Carmichael memo. The guidelines issued at that time stated that "each person aboard an interdicted vessel shall be spoken to by an INS officer, through an interpreter." A log record was to be maintained for each person spoken to and the following inquiries were to be made:

a. Name;
b. Date of Birth;
c. Nationality;

d. Home Town (obtain sufficient information to enable a later location of the individual to check on possible persecution);

e. All Documents or Evidence Presented;

f. Why did you leave Haiti;

g. Why do you wish to go to the United States;

h. Is there any reason why you cannot return to Haiti?

4. The memorandum also stated that INS officers were to be alert for any indications that a person might qualify as a refugee under the United Nations Convention and Protocol. If there were any indications that a person might be a refugee the INS officer was to conduct an interview out of the hearing of other persons regarding the alien's possible qualification for refugee status. Individual records were to be made of all such interviews and persons who appeared to have a bona fide claim to refugee status were removed from the interdicted vessel and transported to the United States. See Attachment D.

5. The guidelines and instructions have been periodically updated and expanded. See Attachments E and F, Immigration & Naturalization Team Boarding Instructions, September 1, 1983; Immigration Naturalization Team Boarding Instructions, September 24, 1985. However, the basic concept of pre-screening has remained the same since the beginning of the program.

6. The purpose of the asylum pre-screening process is to determine, in an informal, nonadversarial setting, whether a person exhibits a credible fear of persecution and should therefore be brought into the United States in order to apply for asylum. The pre-screening process is necessarily a brief one, designed to take place when interdicted aliens are taken into custody on Coast Guard cutters on the high seas.

7. During the eleven years that the program has been in place aliens from nineteen different countries have been

interdicted. Although the majority of interdictions involve nationals of Haiti and the Dominican Republic, INS has also encountered nationals of Bangladesh, Colombia, India, Jamaica, Bahamas, and Sri Lanka.

8. The current INS operational guidelines were communicated to INS officers in memoranda dated March 1, November 22 and November 30, 1991. Copies of these memoranda are attached as Exhibits G through I.

9. Currently, all interviews are conducted by INS asylum officers who have undergone extensive training since the reorganization of the asylum program mandated by the asylum regulations issued on July 27, 1990, 8 C.F.R. Part 208. This training included extensive review of substantive asylum law as well as carefully developed sessions on interview techniques. Instruction was given not only by officials of INS and other government agencies, but also by representatives of non-government organizations active in asylum issues.

Since that time additional training and guidance has been provided to officers regarding the standards for determining whether a person has shown a credible fear of returning to his or her country of origin, in this case Haiti. As set forth in the November 22 Memorandum (Exhibit H), these standards include but are not limited to the following examples of acts which may establish a person's eligibility for asylum:

1. Serious threats to life or freedom;
2. Deliberate imposition of serious economic hardship, so as to deprive a person of all means of earning a livelihood;
3. Constant surveillance;
4. Purposeful interference with a person's privacy, family, home, or correspondence;

5. Enforced social or civil inactivity; and

6. Pressure to become an informer.

Officers are encouraged to ask questions in order to obtain adequate information for initially evaluating a person's claim for asylum.

10. The pre-screening process that has been in effect since 1981, is not intended as a full adjudication of an individual's eligibility for refugee status. The pre-screening is intended to do nothing more than identify persons who have established a credible fear of returning, in this case, to Haiti because of a serious danger or threat of harm on account of race, religion, nationality, membership in a particular social group, or political opinion. The proof necessary to establish a credible fear of returning is considerably less than that required to prove eligibility for refugee status. If a person establishes a credible fear of returning, he or she is then eligible for transfer to the United States to pursue an asylum claim. Many persons who meet the credible fear of returning standard may ultimately be found not to be refugees, but the credible fear test ensures that persons who are refugees are not mistakenly sent back to Haiti.

11. Several months ago, a temporary restraining order was entered against the government that prohibited the repatriation of Haitians who had been interdicted. See *HRC v. Baker*, No. 91-2653-CIV-Atkins (S.D. Fla.). During the pendency of that litigation, the Coast Guard vessels were unable to return any persons to Haiti. This resulted in serious overcrowding on board the Coast Guard vessels. In response to the court's order and in light of the serious overcrowding on the Coast Guard vessels, the United States opened temporary housing and processing facilities at the United States Naval Base at Guantanamo Bay, Cuba.

12. The majority of pre-screening interviews have been conducted at the Guantanamo facilities. Interviews on board the Coast Guard vessels were resumed sometime in mid-February of this year. However, there are instances in which persons will be brought to Guantanamo for the pre-screening process. For example, if the Coast Guard vessel has too many people on board, or weather conditions prohibit on board processing, the interdicted aliens will be brought to Guantanamo. Prior to the pre-screening interview the Haitian nationals are briefed on the interview process. The substance of the briefing is a modified version of Attachment A to Exhibit G. It is intended not only to prepare people for the interviews they are about to have, but also to reassure them about the confidentiality of the process and the importance of explaining their own situation fully and truthfully. This briefing is repeated by the asylum officer prior to each interview.

13. Pre-screening interviews typically last 20 to 30 minutes. To help reduce anxiety and encourage full disclosure of personal conditions, all members of an immediate family are usually interviewed in a group.

14. At the outset of each interview the asylum officers explain again the purpose of the interview. If the person states that he or she has a fear of return to Haiti, the officer explores in more detail the elements of the claim, attempting to discern whether there may be a correlation between the stated grounds for the fear and the statutory bases for asylum. Additionally, the officer makes a determination about the credibility of the claim. If the interviewee does not articulate a fear of return, the officer asks a series of questions designed to determine if such a fear does exist. Examples of the questions used by the officers are found in Attachment B to the March 1 memorandum (Exhibit G) and in the November 22 memorandum (Exhibit H). Once again, if the person then describes such a fear, the officer develops the details

of the claim. The officer then makes the same evaluations: (1) whether there exists a correlation between the grounds for the fear and the bases for asylum; and (2) the credibility of the claim.

15. In evaluating these claims, the asylum officers in Guantanamo have access to country information reports prepared by the State Department and other government organizations. Additionally, the asylum officers have information provided, at the request of the INS Resource Information Center, by a wide range of non-governmental organizations, with specific information on the current human rights situation in Haiti. Use of this information is specifically provided for in the asylum regulations, 8 C.F.R. § 208.12. This country-specific information has been read by all interviewers and discussed extensively at lengthy training sessions conducted on an ongoing basis. The country specific information would include, for example, known allegations of mistreatment of repatriated Haitians.

16. The officer records the information from each interview on a pre-screening interview record, a copy of which is Attachment C to the March 1 memorandum (Exhibit G). To help ensure consistency, accuracy, and fairness in both the interviews and the recommendations, each record is reviewed by a quality control team headed by a supervisory asylum officer. These reviewers can reverse individual recommendations where appropriate.

17. At this time INS has pre-screened all interdicted Haitians. However, it is important to remember that the interdiction program is ongoing. An interdiction could take place at any time and the aliens would have to be pre-screened. To the best of my knowledge, at this time the pre-screening process is complete and those persons who have 1) been "screened in," 2) had a medical screening that established that the alien does not have any communicable diseases, and 3) been inspected by an

INS Inspector are being brought into the United States to pursue their asylum applications.

18. Prior to entering the United States all persons must undergo a medical screening to determine whether the person has any communicable diseases of public health significance. Each "screened in" person is also inspected to ensure that persons who are statutorily precluded from admission to the United States are not paroled into the United States. An example of someone who is statutorily precluded from admission would be a person who was convicted of murder. In addition, the Community Relations Service (CRS) of the Department of Justice makes every effort to coordinate the placement of "screened in" persons with local voluntary organizations before the person is brought to the United States.

19. To date, 6,526 Haitians have been "screened in," determined to have a credible fear of returning to Haiti. Of that number, approximately 3,100 have been paroled into the United States after having undergone a medical screening that established they did not have any communicable diseases of public health significance. The majority of "screened in" aliens will be paroled into the United States. However, there are other steps that must be completed before an interdicted alien with a communicable disease of public health significance is brought into the United States.

20. There are still approximately 3,500 "screened in" Haitians at Guantanamo. This group consists of Haitians who:

a.) Have completed the medical screening process, do not have any communicable diseases, and will be paroled into the United States as soon as such things as CRS placement and transportation can be arranged; or

b.) Are awaiting the results of their medical screening and will be paroled into the United States when

the medical screening is completed and it is determined they do not have any communicable diseases; or

c.) Have been found to have a communicable disease (HIV) and are statutorily precluded from admission to the United States; or

d.) Have been found to be statutorily precluded from admission to the United States because they have been convicted of aggravated felonies or other particularly serious crimes.

21. The number of persons "screened in" before the September 1991 coup was so small that the issue of excludability on the basis of a communicable disease of public health significance, or criminal convictions, did not present itself. However, current statistics, based on those Haitians who were "screened in" and have completed the medical testing, show that the percentage of "screened in" Haitians who have a communicable disease of public health significance (HIV) is approximately five to seven percent of the "screened in" population. Therefore, we expect the total population of "screened in" Haitians with a communicable disease of public health significance to be between 200 and 400 persons.

22. Because aliens who have a communicable disease are statutorily precluded from entering the United States, the group of "screened in" Haitians who are HIV infected present a special problem. Section 212(a)(1) of the Immigration and Nationality Act (INA), Exhibit J, Rees Memo.

23. With respect to refugees, the INA provides that the Attorney General may waive the medical exclusion "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." Section 207 (c)(3) of the INA. The INA further provides that the Attorney General may parole aliens into the United States "for emergent reasons or for reasons deemed strictly in

the public interest." Section 212(d)(5)(A) of the INA. In addition, a person who is a refugee may be paroled into the United States, rather than admitted as a refugee under the formal refugee admission process, only when the Attorney General finds parole to be required by "compelling reasons in the public interest." Section 212 (d)(5)(B) of the INA.

24. In an effort to ensure that no genuine refugee is repatriated, and that persons are not brought into the United States who are not genuine refugees when the statute and public safety preclude their admission into the United States, INS is conducting a second interview to determine whether persons who are HIV infected qualify as refugees under the INA. This requires a finding by the Asylum Officer that the person is unable or unwilling to return to Haiti because of a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

25. This is not an asylum or refugee adjudication. Rather, we are using the well-founded fear test to help the government in determining whether or not it should exercise its discretion to grant parole to persons statutorily ineligible for admission to the United States.

26. Second interviews are conducted according to the usual standards and techniques for asylum interviews. See Exhibit K, Interview Checklist, INS Asylum Branch Procedures Manual and Operations Instructions, p. 121 (March 1992). As previously stated, all INS Asylum Officers have undergone extensive training which included an exhaustive review of substantive asylum law as well as carefully developed sessions on interview techniques.

27. At the conclusion of each second interview the asylum officer prepares an Asylum Assessment for each applicant and makes a recommendation that the alien is, or is not, eligible for refugee status in accordance with the format set forth in the Procedures Manual and Operations Instructions. See Exhibit L, p. 122-25.

28. All Asylum Assessments are then forwarded to the Director of the Asylum Branch and the Asylum Assessments are reviewed by INS Headquarters. Final determinations are not made by the Asylum Officers at Guantanamo Bay. The Asylum Officer only makes a recommendation on whether the alien qualifies as a refugee under the INA.

29. When INS Headquarters makes a determination that a well-founded fear of persecution exists, the case is then forwarded to the State Department for information concerning the accuracy of the applicant's assertions about his or her experiences and about country conditions specific to the events in the claim.

30. As long as the State Department does not provide any adverse information, the person is then eligible to apply to the Attorney General for a discretionary grant of parole on the premise that he or she is in all probability a refugee.

31. This procedure is only followed when a person has a communicable disease of public health significance that is not curable. Persons who can be treated and cured receive medical treatment and are then paroled into the United States when the disease is cured. In some instances treatment is completed after parole.

32. INS has a total of 82 Asylum Officers. We are currently in the process of training 77 Asylum Officers who will graduate on March 27, 1992, and immediately enter on duty. A substantial number of the officers now on duty have been rotated through Guantanamo Bay. At the present time, 15 teams, consisting of an Asylum Officer and a Creole-speaking interpreter, are stationed at Guantanamo Bay. In addition, 2 supervisory officers are stationed at Guantanamo. INS has also stationed support staff and administrative personnel at the base. There are also three INS Inspectors at Guantanamo who process those aliens who are screened into the United States. The Inspectors determine whether the "screened

in" aliens may be brought to the United States and prepare employment authorization documents for aliens paroled into the United States.

33. The absence of the Asylum Officers from their regular duty stations has had a significant impact on the growing backlog of asylum cases at the asylum offices. It has also effected INS's ability to issue employment authorization to asylum applicants.

ACCESS TO COUNSEL

34. In addition to refugee processing, there are numerous immigration benefits that require application and processing outside of the United States. There is no right to counsel during the application and processing of these immigration benefits. Although this does not mean that an attorney may not play a role in the process, attorneys have no right to appear, put on witnesses, or challenge decisions that are made in overseas processing.

35. As previously stated, the purpose of the asylum pre-screening process is to determine, in an informal, nonadversarial setting, whether a person exhibits a credible fear of persecution and should therefore be brought into the United States in order to apply for asylum. The pre-screening process is necessarily a brief one, designed to take place when interdicted aliens are taken into custody on Coast Guard vessels on the high seas. Access to counsel is logistically incompatible with Coast Guard interdictions. It is also incompatible with the informal and nonadversarial interview pre-screening process.

36. INS's inability to repatriate screened out aliens to Haiti due to the injunction that was entered in *HRC v. Baker*, No. 91-2653-CIV-Atkins (S.D. Fla.) necessitated the temporary relocation of the interviewing process to Guantanamo. But for this fact, there would not be a large production population of Haitians at the Guantanamo Naval Base. It would have been inappropriate to make fundamental changes in the process on the basis

of this temporary circumstance that was caused by the court order. Moreover, it would be inconsistent to allow counsel access to aliens who for some reason cannot be interviewed on board the Coast Guard vessels but deny aliens who are interviewed on board a vessel access to counsel.

37. In addition, to maintain a meaningful interview process, access to the aliens being held at Guantanamo is—in coordination with military authorities (*see* 32 C.F.R. § 761—restricted to those persons or organizations who have been approved to enter in an official capacity in connection with the U. S. government's processing of interdicted aliens (such as the United Nations High Commission on Refugees), to provide essential services to the aliens or to provide information to the public on issues relating to the process, and whose presence, in the judgment of INS officials, will not unduly interfere with the confidentiality, efficiency, security, or effectiveness of the process.

38. If access to counsel had been permitted during the pre-screening it would have caused substantial problems. At one point there were approximately 12,000 interdicted Haitians at Guantanamo. The Base facilities were being taxed beyond their capacity. Simple daily necessities such as sanitation, housing, food, and communications were becoming a problem. Allowing counsel access to the aliens would have exacerbated the situation.

39. Moreover, any time a large number of people are concentrated in a small area there are crowd control and safety concerns that arise. Control of the population is a major concern. The safety of aliens, government personnel, and counsel would be more difficult to assure if the camp population were subject to outside influences. Just the logistics of moving aliens to areas where they could meet with counsel would pose a problem.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 20, 1992 at Phoenix, Arizona.

/s/ John W. Cummings
JOHN W. CUMMINGS
Acting Assistant Commissioner
for Refugees, Asylum and Parole
Immigration and Naturalization
Service

EXHIBITS "A" Presidential Proclamation No. 4865
and "B" Executive Order 12,324
are included separately in this Joint Appendix

EXHIBIT C TO
DECLARATION OF JOHN W. CUMMINGS

MEMORANDUM

Subject

INS Role in and Guidelines for Interdiction at Sea; Revised: March 29, 1982

Date 5 Apr. 1982 CO 208-C

To All INS Employees Assigned to Duties Related to Interdiction at Sea

From Doris M. Meissner
Acting Deputy Commissioner
Immigration & Naturalization Service

The following directives are to be followed by INS employees assigned to Coast Guard vessels interdicting vessels at sea pursuant to Presidential Proclamation Number 4865, dated September 29, 1981, and Executive Order Number 12324, dated September 29, 1981.

GENERAL:

- Due to the sensitive nature of the assignment, all INS employees will be under the direct supervision of INS Central Office Headquarters, Associate Commissioner, Examinations.

- The only function INS officers are responsible for is to ensure that the United States is in compliance with its obligations regarding actions toward refugees, including the necessity of being keenly attuned during any interdiction program to any evidence which may reflect an individual's well-founded fear of persecution by his or her country of origin for

reasons of race, religion, nationality, membership within a particular social group or political opinion.

• The duties of INS employees assigned to United States Coast Guard vessels will be limited to matters related to the interview of persons on board with respect to documentation relating to entry into the United States and possible evidence of refugee status.

• Except for independent determinations with respect to documentation relating to entry into the United States and possible claims to refugee status, INS officers will be subject to maritime directives and rules made by the Commanding Officer of the United States Coast Guard vessel.

AUTHORITY:

1. Presidential Proclamation Number 4865 dated September 29, 1981 (High Seas Interdiction of Illegal Aliens).
2. Executive Order Number 12324 dated September 29, 1981 (Interdiction of Illegal Aliens).
3. Associate Attorney General's directive to the Acting Commissioner of INS, dated October 2, 1981.
4. Article 33, United Nations Convention and Protocol Relating to the Status of Refugees.

BOARDING OF VESSELS:

• All decisions relating to which vessels will be interdicted and in what manner vessels will be boarded will be made at the discretion of the Commanding Officer of the United States Coast Guard vessel.

• INS officers and interpreters will be members of each boarding party. INS employees will not be armed.

• All initial announcements to the master, crew, and passengers of a boarded vessel as to the purpose of boarding, separation of crew and passengers, and general procedures (including advice that the boarded vessel may be returned to Haiti) will be made by United States Coast Guard personnel at the time the vessel is first boarded.

INS OFFICER RESPONSIBILITIES:

A. To the extent that it is, within the opinion of the Comanding Officer of the United States Coast Guard vessel, safe and practicable, each person aboard an interdicted vessel shall be spoken to by an INS officer, through an interpreter. A log record shall be maintained of each such person, based on their responses to the following inquiries:

   1. Name;
   2. Date of Birth;
   3. Nationality;
   4. Home Town (obtain sufficient information to enable a later location of the individual to check on possible persecution);
   5. All Documents or Evidence Presented;
   6. Why did you leave Haiti;
   7. Why do you wish to go to the United States;
   8. Is there any reason why you cannot return to Haiti.

B. A copy of the log prepared by the INS officers shall be provided to the Commanding Officer of the Coast Guard vessel.

C. INS shall be constantly watchful for any indication (including bare claims) that a person or persons on board the interdicted vessel may qualify as refugees under the United Nations Convention and Protocol.

D. If there is any indication of possible qualification for refugee status by a person or persons on board an interdicted vessel, INS officers shall conduct individual interviews regarding such possible qualification.

E. Interviews regarding possible refugee status shall be conducted out of the hearing of other persons.

F. If necessary, INS officers will consult with Department of State officials, either on board, or via radio communications.

G. Individual records shall be made of all interviews regarding possible qualification for refugee status.

H. If the interview suggests that a legitimate claim to refugee status exists, the person involved shall be removed from the interdicted vessel, and his or her passage to the United States shall be arranged.

I. Individual record folders shall be prepared and maintained by INS officers in every case where a person is being sent on to the United States, and such record folder may be used to support such person's claim in the United States. (The individual folder shall contain a sworn statement by the applicant concerning the claim.)

CHANGES:

• Any of the foregoing directives is subject to revision on the basis of experience.

CONDUCT AND SHIPBOARD PROCEDURES FOR I&NS PERSONNEL

QUARTERS: Assigned quarters will be kept neat and clean in conjunction with room-mates. Bunks will be made every morning, and linen changed once a week on the assigned day.

MEALS: Officers and civilians are only charged for the meals they eat. Each I&NS employee must pay all of his food bill before he leaves the ship. The same wardroom procedures followed by ship officers will be followed by I&NS personnel while using the wardroom. No one should be seated at the lunch or dinner meal until the XO is seated and given permission to the others. If the XO is still seated when you are ready to leave the table his permission should be requested before leaving. Leftover snacks are kept in the wardroom pantry for after hours. Coffee and cold drinks are always available. The average cost for 3 meals is $5 to $6 per day.

LAUNDRY: You may send you laundry once a week on the assigned day for officers by purchasing a laundry bag at the ship's store. Leave the bag outside of your room and the officer's mess cook will pick it up and return it the same day. Civilian clothes do not make out well in the ship's laundry and you may want to do your own.

SHIP'S STORE: The ship's store is open at noon and 5:00 P.M. for about an hour. Tobacco, candy, soap, and various sundry items are available at reasonable prices.

MAIL: Mail should be addressed with your name, the name of the ship and c/o U.S. Coast Guard Air Station, Clearwater, Florida. Outgoing mail will leave by helicopter to Guantanamo Bay, Cuba, sometime during the week and leave the C-130 on Friday to the States. Incoming mail will leave each Saturday on the incoming C-130 and will be picked up by the ship's helicopter on

the same day. Stamps are available in the ship's post office.

AUTHORIZED AREAS: Most areas aboard ship are open to I&NS personnel, except the rooms marked RESTRICTED. Likewise, I&NS personnel should not enter other living quarters unless invited by those living there. Machinery spaces should not be entered unless accompanied by a crewmember who will gladly show you around. During flight, quarters on the after half of the open decks are restricted for safety. While on the bridge I&NS personnel should not get in the way of operating personnel during boarding, docking or any other operation where the bridge personnel are busy. The wardroom should be vacated during officers call at 12:30 P.M. daily.

SHORE LEAVE: When in Guantanamo Bay, Cuba, or Haiti, I&NS personnel are restricted to the same shore leave as the officers and crew and must be back aboard one hour before the time set for departure. In Guantanamo Bay, the stores are available to I&NS personnel as well as other establishments catering to the military. There is a telephone center near the Marine Corps exchange, where you may phone the States. Public taxi is available dockside if you do not wish to walk.

EXHIBIT D TO
DECLARATION OF JOHN W. CUMMINGS

MEMORANDUM

Subject INS Role in and Guidelines for Interdiction at Sea; Revised: September 24, 1982

Date September 24, 1982 CO 208-C

To All INS Employees Assigned to Duties Related to Interdiction at Sea

From Andrew J. Carmichael, Jr.
Associate Commissioner
Examinations

The following directives are to be followed by INS employees assigned to Coast Guard vessels interdicting vessels at sea pursuant to Presidential Proclamation Number 4865, dated September 29, 1981, and Executive Order Number 12324, dated September 29, 1981.

GENERAL:

- Due to the sensitive nature of this assignment, all INS employees will be under the direct supervision of INS Central Office Headquarters, Associate Commissioner, Examinations.

- The only function INS officers are responsible for is to ensure that the United States is in compliance with its obligations regarding actions toward refugees, including the necessity of being keenly attuned during any interdiction program to any evidence which may reflect an individual's well-founded fear of persecution by his or her country of origin for reasons of race, religion, nationality, membership within a particular social group or political opinion.

- The duties of INS employees assigned to United States Coast Guard vessels will be limited to matters

related to the interview of persons on board with respect to documentation relating to entry into the United States and possible evidence of refugee status.

• Except for independent determination with respect to documentation relating to entry into the United States and possible claims to refugee status, INS officers will be subject to maritime directives and rules made by the Commanding Officer of the United States Coast Guard vessel.

AUTHORITY:

1. Presidential Proclamation Number 4865 dated September 29, 1981 (High Seas Interdiction of Illegal Aliens).
2. Executive Order Number 12324 dated September 29, 1981 (Interdiction of Illegal Aliens).
3. Associate Attorney General's directive to the Acting Commissioner of INS, dated October 2, 1981.
4. Article 33, United Nations Convention and Protocol Relating to the Status of Refugees.

BOARDING OF VESSELS:

• All decisions relating to which vessels *will* be interdicted and in what manner vessels will be boarded will be made at the discretion of the Commanding Officer of the United States Coast Guard vessel.

• INS officers and interpreters will be members of each boarding party. INS employees will not be armed.

• All initial announcements to the master, crew, and passengers of a boarded vessel as to the purpose of boarding, separation of crew and passengers, and general procedures (including advice that the boarded vessel may be returned to Haiti) will be made by

United States Coast Guard personnel at the time the vessel is first boarded.

INS OFFICER RESPONSIBILITIES:

A. To the extent that it is, within the opinion of the Commanding Officer of the United States Coast Guard vessel, safe and practicable, each person aboard an interdicted vessel shall be spoken to by an INS officer, through an interpreter. A log record shall be maintained of each such person, based on their responses to the following inquiries:

   1. Name;
   2. Date of Birth;
   3. Nationality;
   4. Home Town (obtain sufficient information to enable a later location of the individual to check on possible persecution);
   5. All Documents or Evidence Presented;
   6. Why did you leave Haiti;
   7. Why do you wish to go to the United States;
   8. Is there any reason why you cannot return to Haiti?

B. A copy of the log prepared by the INS officers shall be provided to the Commanding Officer of the Coast Guard vessel.

C. INS officers shall be constantly watchful for any indication (including bare claims) that a person or persons on board the interdicted vessel may qualify as refugees under the United Nations Convention and Protocol.

D. If there is any indication of possible qualification for refugee status by a person or persons

on board an interdicted vessel, INS officers shall conduct individual interviews regarding such possible qualification.

E. Interviews regarding possible refugee status shall be conducted out of the hearing of other persons.

F. If necessary, INS officers will consult with Department of State officials, either on board, or via radio communications.

G. Individual records shall be made of all interviews regarding possible qualification for refugee status.

H. If the interview suggests that a bona fide claim to refugee status may exist, the person involved shall be removed from the interdicted vessel, and his or her passage to the United States shall be arranged.

I. Individual record folders shall be prepared and maintained by INS officers in every case where a person is being sent on to the United States, and such record folder may be used to support such person's claim in the United States. (The individual folder shall contain a sworn statement by the applicant concerning the claim.)

CHANGES:

• Any of the foregoing directives is subject to revision on the basis of experience.

As per request from Renee L. Szybala, Department of Justice, Item H amended to read "may exist", August 25, 1982.

As per request from BHRHA, Item H "bona fide claim" should be substituted for "legitimate claim", September 24, 1982.

EXHIBIT E TO DECLARATION OF JOHN W. CUMMINGS

IMMIGRATION & NATURALIZATION TEAM BOARDING INSTRUCTIONS

1. The I&NS team will answer all boarding calls by reporting to the Bridge. When a Haitian Vessel has been identified and the Captain of the Coast Guard Cutter has decided to board the vessel, the team will report to the boarding Officer at the small boat station. A stena type pad will be carried to record the information necessary for the boarding report to be prepared on the cutter.

2. The Immigration Officer and interpreters will make the initial boarding of the Haitian vessel with the CG boarding Officer and assist him with translating and a document check of the vessel and POB's. If the vessel is engaged in legitimate trade and all POB's are properly documented as crew or passengers the I&NS team will aid the boarding Officer in obtaining the names and other data from the crew necessary for the boarding report.

On vessels where either all or some POB's are found to be undocumented Migrants, the I&NS Officer will question each Migrant as to his nationality, destination, purpose of trip, and any documents he might have. If the answers indicate they are undocumented Haitian Migrants enroute to the U.S. to work, they are to be informed that they cannot legally continue to the U.S. and must be returned to Haiti. Each Migrant should then be asked if he or she has any fear in returning to Haiti. If the answers are No, the Captain of the Cutter will then be informed that there are (number of Male, Female, & Children) to be returned to Haiti.

3. When a possible applicant for asylum is identified, INS Officer will consult with the Boarding Officer and decide where further interview will take place. If the

INS Officer finds that the alien has a possible claim to asylum, he will forward the "question sheet" by cable for advisory opinion from Department of State, BHRHA. Once the opinion has been given, the INS Officer will make the determination to either forward the applicant to the United States, or return him to Haiti.

4. If the Captain of the Coast Guard Cutter, due to weather or other reasons, decides to terminate the boarding, INS will take whatever steps necessary to assure that an individual with a valid claim to asylum is not returned to Haiti.

5. At All times the I&NS team will be under the direction of the CO and the Boarding Officer, with the exception of the process of making the required INS determinations.

6. Immediately after the decision to return has been made, the I&NS team will obtain the names place and date of birth and home address of each Haitian Migrant. The I&NS Officer will then assist the Operations Officer aboard the Cutter with the SITREP required at this time. After the initial report is completed the I&NS team will question each adult Migrant separately and obtain from them a brief resume of the events that took place before their departure and during the voyage to the point of interception. The questioning is for intelligence purposes. The I&NS Officer should attempt to uncover any organized smuggling operation and obtain the names of any smugglers in the group or on shore. The information should be freely given by the Migrant. The I&NS Officer will then prepare a brief report on his findings. A copy of this report along with copies of the resume from each migrant will be given to the Operation's Officer, a copy will remain in the INS boarding bag aboard the Cutter, another prepared for the U.S. Embassy attache at Port-Au-Prince and one copy to the I&NS Interdiction Officer in Miami.

7. During the rest of the voyage to PAP the I&NS team will mingle with the Haitian Migrants assisting the Coast Guard team tending the Migrants. The team will be alert for any indication of fear of returning to Haiti.

8. Upon arrival in Port-Au-Prince, the I&NS Officer will give both the Coast Guard Liaison Officer and the U.S. Embassy Official a copy of the report obtained in #6, and a copy of the names and addresses of the Migrants. The Haitian Government Immigration Officer will need 4 copies of the list of names and addresses. *NO* other information obtained from the Migrants will be given to any Haitian official.

9. During the Haitian processing the I&NS Officer and interpreter will remain in the room and observe the proceedings until the migrants are released to the Haitian Red Cross. The I&NS Officer should be alert for any act or demeanor on the part of the Haitian Officials which would indicate present on intended persecution or punishment of the Haitian Migrants.

WANGDOC 1751Z
REV 09 AUG 83

/s/ Harold L. Boyce
HAROLD L. BOYCE
Supervisory Interdiction
Operations Officer

EXHIBIT F TO DECLARATION OF JOHN W. CUMMINGS

IMMIGRATION & NATURALIZATION TEAM BOARDING INSTRUCTIONS

1. The I&NS team will answer all boarding calls by reporting to the Bridge. When a Haitian vessel has been identified and the Captain of the Coast Guard cutter has decided to board the vessel, the team will report to the boarding Officer a the small boat station. A stena type pad will be carried to record the information necessary for the boarding report to be prepared on the cutter.

2. The Immigration Officer and interpreters will make the initial boarding of the Haitian vessel with the CG boarding Officer and assist him with translating and a document check of the vessel and POB's. If the vessel is engaged in legitimate trade and all POB's are properly documented as crew or passengers the I&NS team will aid the boarding Officer in obtaining the names and other data from the crew necessary for the boarding report.

On vessels where either all or some POB's are found to be undocumented Migrants, the I&NS Officer will question each Migrant as to his nationality, destination, purpose of trip, and any documents he might have. If the answers indicate they are undocumented Haitian Migrants enroute to the U.S. to work, they are to be informed that they cannot legally continue to the U.S. and must be returned to Haiti. Each Migrant should then be asked if he or she has any fear in returning to Haiti. If the answers are NO, the Captain of the cutter will then be informed that there (number of Male, Female, & Children) to be returned to Haiti.

3. When a possible applicant for asylum is identified, I&NS Officer will consult with the Boarding Officer and decide where further interivew will take place. If the I&NS Officer finds that the alien has a possible claim to

asylum, he will forward the "question sheet" by cable for advisory opinion from Department of State, BHRHA. Once the opinion has been given, the I&NS Officer will make the determination to either forward the applicant to the United States, or return him to Haiti.

4. If the Captain of the Coast Guard cutter, due to weather or other reasons, decides to terminate the boarding, I&NS will take whatever steps necessary to assure that an individual with a valid claim to asylum is not returned to Haiti.

5. At All times the I&NS team will be under the direction of the CO and the Boarding Officer, with the exception of the process of making the required I&NS determinations.

6. Immediately after the decision to return has been made, the I&NS team will obtain the names place and date of birth and home address of each Haitian Migrant. The I&NS Officer will then assist the Operations Officer aboard the cutter with the SITREP required at this time. After the initial report is completed the I&NS team will question each adult migrant separately and obtain from them a brief resume of the events that took place before their departure and during the voyage to the point of interception. The questioning is for intelligence purposes. The I&NS Officer should attempt to uncover any organized smuggling operation and obtain the names of any smugglers in the group or on shore. The information should be freely given by the migrant. The I&NS Officer will then prepare a brief report on his findings. A copy of this report along with copies of the resume from each migrant will be given to the Operations Officer, a copy will remain in the I&NS boarding bag aboard the Cutter, another prepared for the U.S. Embassy attache at Port-Au-Prince and one copy to the I&NS Interdiction Officer in Miami.

7. During the rest of the voyage to Port-Au-Prince the I&NS team will mingle with the Haitian Migrants assist-

ing the Coast Guard team tending the migrants. The team will be alert for any indication of fear of returning to Haiti.

8. Upon arrival in Port-Au-Prince, the I&NS Officer will give both the U.S. Coast Guard Liaison Officer and the U.S. Embassy official a copy of the report obtained in #6, and a copy of the names and addresses of the migrants. At least 10 more copies of the list of names and addresses will be prepared for the Haitian officials and the Haitian Red Cross workers. Any other information obtained concerning the smuggling operation will be evaluated by the Embassy Officer, and only he may give part or all of our information to the Haitian officials, for use in any action against the smugglers.

9. During the Haitian processing the I&NS Officer and interpreter will remain in the processing area and observe the proceedings. After the last migrant has been released to the Haitian Red Cross, the I&NS team may leave the area. During the processing the team should be alert for any act or demeanor on the part of the Haitian officials which would indicate present or intended persecution or punishment of the Haitian migrants. The Haitian Major, in charge of the water front, has granted us use of the tourist facilities on the dock for processing large groups of migrants. After any group has left the cutter for processing in the tourist area, they are still under the protection of the bilateral agreement, until the last one has been cleared by the Haitian authorities and has been turned over to the Haitian Red Cross. The cutter will not depart until the Senior I&NS Officer has informed the Captain that all migrants have been cleared by the Haitian authorities.

Should any migrant make a claim to a fear of persecution during the processing, he will be removed to the cutter and processed under #3. Under no circumstances will the I&NS Officer permit the Haitian authorities to remove a possible asylee unless he is satisfied that there

is no basis to his claim after processing under #3. *Remember*, if there is any doubt whether a migrant does or does not have a well founded fear of persecution the migrant will be returned to the cutter and brought to the U.S. where an asylum claim may be made.

/s/ Harold L. Boyce
HAROLD L. BOYCE
Supervisory Interdiction
Operations Officer

DAILY ROUTINE AND RESPONSIBILITIES FOR THE I & NS TEAM, ABOARD U.S. COAST GUARD CUTTERS INVOLVED IN HAITIAN MIGRANT INTERDICTION OPERATIONS AT SEA

WORKDAY:

The regular workday will be from 8:00 am to 4:00 pm, Monday thru Sunday. There will be no days off unless the cutter is inport and the Captain grants shore leave to the crew. All calls to duty outside of the regular working hours, 40 hour week, will be reflected on the T&A's, for Interpreters as 45 ACT OT. Call back will be a minimum of two hours per the AM. The 3 Miami based CORAP Interdiction Officers, will charge all OT under AUO two exceptions:

(1) Per AM2988.05 (11a) the assigned 8 hours on Saturday and Sunday is not AUO and must be reflected on the T&A's as 45 ACT-OT.

(2) The actual time spent on an interdiction, when outside regular hours, will be reflected as 31 ACT-OT.

Time will start when you report for the boarding and stop after all of the migrants have been questioned, the necessary information logged and the decision made to either permit their entry or return them to their country.

The Interdiction Officer will maintain a record of his and the Interpreters time and send a message (form in the boarding bag) to the Interdiction Officer in Miami on the last Wednesday of each pay period. Any OT worked after the cable is sent, will be reported the next day period in the (last pay period only) block under object class z 142 & z 165, AUO will be shown in the (AUO prior pay period line).

QUARTERS:

Assigned quarters will be kept neat and clean in conjunction with roomates. Bunks will be made every morning and linen changed once a week on the assigned day for Officers. When space is available you will be billeted in Officers quarters with a CG officer or in Chiefs quarters. At times when space is at a premium you might have to be quartered in what is available.

MEALS:

You will eat in the wardroom. The Officer in Charge of the Officers mess will give you a bill before you leave, it must be paid at that time. While using the wardroom the same procedures used by the ships Officers will be used by the I&NS Officer and Interpreter.

LAUNDRY:

You may wash your clothes once a week on the assigned day for Officers. On the 378's, however, laundry is done by laundry room crew and your laundry should be left outside your room on the assigned day. Civilian clothers do not make out to well in the ships laundry and you might want to wash some of your clothes by hand. A bottle of detergent and an iron is kept in the boarding bag for this purpose. When empty, detergent can be purchased in GTMO.

SHIPS STORE:

The ships store is open every day on most cutters for about an hour. Tobacco, candy, toilet articles and various sundry items are available at reasonable prices. In GTMO the exchanges are open to I&NS personnel.

AUTHORIZED AREAS:

Most areas aboard are open to I&NS personnel, except the rooms marked on the door "RESTRICTED", they should be entered only on a need to enter basis and then

only when accompanied by a CG personnel who is authorized to enter the room. Machinery spaces should not be entered unless accompanied by an engine room member. While on the bridge I&NS personnel should not get in the way of duty crewmembers operating the ship.

SHORE LEAVE:

When in GTMO or Haiti, I&NS personnel are restricted to the same shore leave as the Officers and crew and must be back aboard the cutter one (1) hour before the time set for departure for muster.

SHIP DRILLS:

During routine drills the I&NS team must proceed to the wardroom and remain there until the drill is over. A lifeboat drill is the only exception, then you will report to your assigned lifeboat station and immediately don you lifejacket. You should memorize the exit procedures from your room in the event of a real fire or other emergencies when lights are out or the passageways are filled with smoke.

MUSTER:

The I&NS team will muster with the Operations section. Muster at sea will be after the noon meal about 1230 hours at fair weather parade (on the flight deck) or in inclement weather on the mess deck. Muster is always held prior to the departure of the cutter from port and always during a man overboard crisis.

CONDUCT:

The I&NS team will conduct themselves as gentlemen both on or off duty. Alcohol consumption is not permitted aboard the cutters. While ashore either in GTMO or HAITI the cutter is on standby and could be recalled at

any time for an interdiction or a SAR case. If a member of the team tends to remain ashore, a number must be left where he may be located. Excessive drinking ashore would have an impact on a team member[']s work if recalled for an interdiction an hour or two away, in view of this moderation would be the best policy. NOTE: An interpreter had to be dismissed from the service after excessive drinking while ashore in GTMO and HAITI, this prevented him from doing his job.

REPORTS

1. *DAILY LOG:*

There is a handwritten log book in the boarding bag. Make an entry each day of operations conducted. Be brief but mention all boardings and any unsual happenings. Note the weather, location of cutter and port calls. Always note the change of Officers and Interpreters and the change of cutters. When returning to Miami bring a copy of the log during your tour of duty aboard. The interpreter will use it to maintain the duplicate log in Miami.

2. *BOARDING LOG:*

All boardings, Haitian or others, must be recorded on the boarding log sheets. A copy of these must be brought back to Miami for the duplicate log.

3 *INTERDICTIONS:*

A list of the migrants and a brief boarding report (see I&NS boarding instructions) must be made for each boarding. A copy of both must be brought back to Miami and placed in the interdiction folder. It is not necessary to keep a copy in the boarding bag.

EXHIBIT G TO
DECLARATION OF JOHN W. CUMMINGS

MEMORANDUM

Subject Procedural Changes in the INS Asylum Pre-Screening Component of the AMIO

Date Mar. 1, 1991

To Leon Jennings
Chief, Asylum Pre-Screening Unit

and

Erich Cauller
Director, Miami Asylum Office

From Asylum Branch
CORAP

The purpose of this memorandum is to detail a series of changes in the conduct of INS asylum pre-screening responsibilities within the Alien Migrant Interdiction Operation (AMIO) authorized by Presidential Order 12324 of September 28, 1981.

Short-term and longer term changes were approved by the Deputy Commissioner on January 29, 1991. These changes were discussed directly with the Coast Guard and with other interested parties in the appropriate fora. The changes outlined below are those which can be made to elements solely within the administrative competence of INS. These are therefore effective immediately. Longer term changes involving substantially lengthened interviews will begin only after concurrence with the Coast Guard and other interested parties has been obtained. However, the pre-interview briefing (Attachment A) should precede all INS interviewing.

Short-term Changes Effective Immediately:

1. The INS role in the overall AMIO will be identified as "Asylum Pre-Screening," operating under the auspices of the CORAP Asylum Branch. The title of the Miami-based office should be Asylum Pre-Screening Unit, with Leon Jennings as Chief, Asylum Pre-Screening Unit, Miami. Mr. Jennings will report directly to the Director of Asylum, who is also his firstline supervisor. The title of other officers in the Unit will be "Asylum Pre-Screening Officer."

2. After the January 24 INS consultation with the Coast Guard here in Washington, DC, INS onboard procedures for interviewing interdicted aliens will be modified to include an opening presentation by the INS officer and his interpreter explaining the purpose of the ensuing interviews with INS (see draft, as Attachment A). This affirmative step is necessary to overcome the overwhelmingly negative atmosphere resulting from the actual interdiction which immediately precedes the INS interviews.

3. Interviews of smaller groups of interdicted aliens (i.e., vessels with less than 45-50 persons onboard) should be expanded to cover all 20 questions on the recommended interview sheet (Attachment B). For the moment, this means that no additional time is needed to complete onboard interviewing; at the same time, we will be able to test the results of using this longer questionnaire. These interviews should be extensively documented, with notes from each interview recorded on a separate form (see Attachment C).

4. Interviews of larger groups of aliens (i.e., vessels with more than 50 persons onboard) should use the current interview record form for note-taking (recording four interviews per page). However, even here, notes taken on this form should be greatly improved to better record each of the alien's replies and should be recorded in

the same detailed manner as affirmative ones. If the alien asserts or even hints at past difficulties at home, or at a possible fear of returning home for any reason, a more in-depth interview with the INS asylum pre-screening officer must be conducted to determine the extent and reasons of the fear and the credibility of the applicant. Each of these longer more in-depth interviews should be extensively documented on a separate form (see Attachment C, mentioned above).

5. We are aware of the increased burden the above changes will place on Service interpreters aboard the cutters. We understand that these interpreters not only interpret during the INS interviews, but then lend their expertise to the Coast Guard to convey essential information and instructions to the aliens and assist Coast Guard officers in maintaining order and control. We realize that this sometimes leads to very long days and strenuous working conditions. However, INS functions remain of primary import to the time of the interpreter; only if time permits, the interpreter can assist the Coast Guard as needed. The question of funding additional Unit interpreters is currently under review at Headquarters. In the meantime, the CORAP approved certification of current Service creole-speaking interpreters should be completed as expeditiously as possible.

6. A Summary Asylum Pre-Screening Interview Record (see Attachment D) should be completed at the end of every interdiction and sent to the Director of Asylum, INS/CORAP, with copies of all interview records attached within one week after the interdiction has been completed.

7. Aliens expressing credible fear of returning home should be routed to the United States to formally pursue an asylum claim before an Asylum Officer of the Miami Asylum Office. This standard (for transfer to the United States) is considerably less than the standard necessary to obtain asylum, but considerably more than the so-called

"frivolous"/"manifestly unfounded," threshold needed for employment authorization. INS officers on the Coast Guard cutter should telex or fax the name and other available bio-data to the relevant INS offices in Miami to conduct a name search, etc., prior to the alien's transfer to the United States. Procedures for such transfers to the United States should be worked out in the near future among the Asylum Pre-Screening Unit, the Miami Asylum Office and the Miami District Office. As necessary, these procedures may need ratification and/or coordination between the CORAP Asylum Branch and other interested offices in Headquarters.

8. Asylum Pre-Screening Officers and Asylum Officers in the Miami Asylum Office shoud be fully aware of the political, cultural, economic and social affairs of the interdicted alien's country of origin, of the current human rights situation existing there, and all recent developments. At a minimum, relevant reference materials should be solicited in writing, with copies kept for the files, from America's Watch (Human Rights Watch), Lawyers Committee for Human Right, Amnesty International and the National Coalition for Haitian Refugees.

9. Such interviewing officers should also be well-versed in asylum law and practice, especially aware of how eligibility under the statutory definition of refugee may be established in situations of general or even localized civil strife. Interviewing officers should be aware that the persecution feared could be from the government, or from a group the government is unwilling to control, or from a group the government is unable to control. An alien's specific, individualized and seemingly-targeted experiences and/or fears are controlling. Officers should be cautious about drawing facile conclusions of general civil strife to situations where such conclusions may be inappropriate. When in doubt, the interviewing officer should consult with his/her supervisor and/or with the Director of Asylum.

10. Any aliens brought to the United States should be paroled in the "public interest" into the care of an appropriate voluntary agency, such as the Haitian Refugee Center for Haitians. Modalities of this parole and the respective roles and responsibilities of the "custodial" voluntary agency and INS should be coordinated by the Miami Asylum Office. At a minimum, the voluntary agency would be responsible for care and maintenance and for arranging appropriate legal assistance in preparing a detailed request for asylum (I-589) and, when possible, an extensive supplementary statement regarding the specifics of an applicant's claim. The voluntary agency should also arrange for the services of a qualified interpreter for the applicant's interview.

11. Any interdicted alien brought to the United States should be interviewed as a matter of urgency; normally this should not exceed 10 working days from the date of parole into the United States. Any alien found ineligible for asylum should be immediately served a Notice to Alien Detained for Exclusion Proceedings (Form I-122), after which the alien could pursue his/her claim de novo before an Immigration Judge. This step is necessary to ensure that individuals with refugee-like characteristics are not unnecessarily detained, while those found ineligible for asylum are not kept in any limbo status while in the United States.

12. Monthly reporting formats and procedures will be modified in the near future to better reflect these changes.

13. Copies of all documentation regarding each interdiction should be sent as soon as completed to the Director of Asylum, INS/CORAP, for review. Written comments will be returned as appropriate to ensure that subsequent processing of interdicted aliens are conducted in accordance with existing policies and procedures.

/s/ Gregg A. Beyer
GREGG A. BEYER
Director of Asylum

Attachment A

Opening INS Statement to Interdicted Aliens

You have been picked up by the United States Coast Guard, operating in this area under an agreement between the United States Government and the Government of the Republic of Haiti. Your boat has been sunk because it has been found unseaworthy for the number of people that were on it and to prevent it from becoming a hazard to other ships in the area.

Those of you in need of medical attention or other special services should contact the INS interpreter immediately following this announcement for assistance. Food and some medical attention will be available to you.

Shortly, you will be interviewed by an officer of the United States Immigration and Naturalization Service. The Immigration Officer will ask you your name, date and place of birth, and occupation. He will also ask you questions regarding your departure, your intended destination, and your purpose in travelling. The Officer is an officer of the Political Asylum Branch of the Immigration Service in Washington, D.C.

Political asylum in the United States is available to persons who generally believe they would be harmed on return home. The Immigration Officer has received special training to assist in making this determination, assessing the merits of a claim and in judging the credibility of a claimant.

These interviews will be conducted completely in private, with an interpreter who is an American citizen with no connections to the Government of Haiti. The information you give, apart from your name and date and place of birth, will be kept strictly confidential.

The Immigration Officer will also ask you questions concerning any fears you may have in returning to your country of origin, such as who you fear and why you have this fear. Meanwhile, the ship will be returning to Port-

au-Prince, where most of you will be disembarked. Upon disembarkation, the Haitian Red Cross will assist you in your return home. Any person having a fear of returning to Haiti must express this fear to the Immigration Officer prior to the arrival of the cutter in Haiti.

The Coast Guard will be helping you to return home in safety and with dignity. No information other than your name, date and place of birth will be given to the Haitian authorities upon your disembarkation.

Attachment B

Asylum Pre-Screening Operation: Interview Questionnaire

Although indicative and not exhaustive, INS interviewers of aliens interdicted under the AMIO should cover the following subjects.

Answers to each subject should be summarized on separate Interview Summary Sheets (see Attachment C). Explanations and replies to questions during the interviews should be recorded on the form as accurately and as completely as possible.

Questions Eliciting Applicant Biographical Information:

1. What is your name?
2. Where were you born?
3. What is your country of origin/nationality?
4. Do you have a passport?
5. What kind of work do you do?

Questions Eliciting Reason(s) for Leaving:

6. Why did you leave (name of country)?
7. Have you ever had any problems with the authorities or other group(s) while in (name of country)? If so, please explain. If so, when was that?
8. Has anyone in your family or immediate neighborhood ever had any problems with the authorities or any other group(s)? If so, when was that? If so, what happened?
9. Have you or any member of your family ever been denied access to schools, or denied employment, or housing? If so, please explain. If so, when was that?

10. Have you ever been arrested or detained by the authorities or any other group(s) for any reason If so, please explain.
11. Has any member of your family ever been arrested or detained by the authorities or any other group(s) for any reason? If so, please explain. If so, when was that?
12. Do you feel you had to leave (name of country) for any reason? If so, please explain.

Questions Eliciting a Possible Fear of Return:

13. If you were to return to (name of country), would you return to your old neighborhood? If not, why? Could you get your old job back if you returned? If not, why not? Could you find someplace to live if you returned? If not, why not?
14. Is there any reason why you cannot return to (name of country)? If so, please explain.
15. What do you think would happen to you if you returned to (name of country)? Would you or any member of your family be harmed? or risk being harmed? If so, by whom? Why would they want to harm you? Please explain.
16. Have you or any member of your family ever done anything in (name of country) which you think might cause you problems if you were to return? If so, please explain.
17. Did you belong to any organization(s) in (name of country)? If so, what kind? Were you active? Does anyone have reason to think you might belong to any organizations they dislike or to impute to you membership in that organization or acceptance of those beliefs?

18. Have you heard of people in situations similar to yours being harmed in your area? Why were they harmed? How is your situation similar to theirs? Do you think you would be similarly harmed if you returned? If so, why?

19. What is your religion? Has anyone ever threatened you or caused you problems because of your religion or your religious beliefs?

20. Do you want to return to (name of country)? If not, why not?

Vessel: _____

ASYLUM PRE-SCREENING INTERVIEW RECORD

Sex	Name	DOB	POB	Address
:	:	:	:	:

_____

_____

Notes of the Interview:

1. Concerning the Claim:

2. Concerning Credibility:

Summary of Interview:

1. Occupation: _____
2. Reason(s) for Leaving _____
3. Fear of Return? If yes, explain: _____

_____

_____

4. Decision: Not a Genuine Asylum Seeker:
   Referral to U.S. for Asylum Processing:

Interdiction: ———/——— Attachment D

SUMMARY ASYLUM PRE-SCREENING
INTERVIEW RECORD

The following information is a summary of the person interviewed by INS (individual interview records are attached):

Date of Interdiction: _____

Interdiction Number: _____ / _____
(year) (number)

Name of Vessel Interdicted: _____

Name of Coast Guard Cutter: _____

Disposition of the Boat: _____

Name of INS Interviewing Officer: _____

Name of INS Interpreter: _____

Country/Countries of Departure: _____

_____

Place(s) of Departure From _____
(country) :

Place(s) of Residence In _____
(country) :

Number of Persons Interdicted: _____

Number of Persons Interviewed: _____

Results of Interviews:

Number Referred to US: _____

Number Return to _____
(country) :

Biographical Data:

Males: Total: ——; Adults:* ——; Minors:* ——

Females: Total: ——; Adults:* ——; Minors:* ——

(*=Minors are defined as under 16)

Main Occupations in _____: _____
(country)
_____
_____

Main Destination(s) Cities: _____
(country/countries)

EXHIBIT H TO DECLARATION OF
JOHN W. CUMMINGS

MEMORANDUM

Subject Asylum Pre-Screening

Date Nov. 22, 1991

To John Cummings
Assistant Commissioner,
Refugees, Asylum, and Parole

From Office of the Deputy Commissioner

The following is a reiteration of the standard set out in the March 1, 1991, guidelines for the INS Asylum Pre-Screening Program. This is the standard which should be followed when conducting the asylum pre-screening of interdicted aliens.

Definition of Credible Fear of Returning to the Country of Origin or Nationality for Asylum Pre-Screening

A credible fear of returning is defined as an apprehension or awareness, which appears to be truthful to an Asylum Pre-Screening Officer (APSO), of serious danger or threat of harm on account of race, religion, nationality, membership in a particular social group, or political opinion. The quantum of proof necessary to establish a credible fear of returning is less than that required to prove a well-founded fear of persecution. An applicant at the asylum-screening stage need only have a story that a reasonable person would believe to establish a credible fear, not the higher standard of establishing that a reasonable person in his or her circumstances would in fact have a fear.

The following list contains examples of acts which may render an applicant eligible under this program: Serious threats to life or freedom; deliberate imposition of serious economic hardship, so as to deprive a person of all means of earning a livelihood; constant surveillance; purposeful interference with a person's privacy, family, home, or correspondence; enforced social or civil inactivity; and pressure to become an informer.

An alien who is determined: 1) to have been convicted of an aggravated felony or a serious crime, 2) to have ordered, incited, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion, 3) to be a dual or multiple national who can avail himself or herself of the protection of a third state, or 4) to be a national of a country of which he or she has no fear of returning, shall not be eligible for consideration under the Asylum Pre-Screening Program.

Credibility Assessment

Each alien will be assessed individually for credibility. The details of the events related should be specific, internally consistent, and plausible in light of the reasonably available information on human rights conditions in the relevant country. Whenever deemed necessary by an APSO, he or she will request information from the Director of the Asylum Division on specific aspects of country conditions necessary to assess credibility in a particular case.

The APSO will take notes of the interview to determine whether a credible fear of returning has been established. If the APSO determines that an alien's claimed fear is not credible or that it is not on account of any of the enumerated grounds, the conclusion will state the reasons

for such a finding. The conclusion must be consistent with the notes of the interview.

Grounds for the "Fear" not Articulated

If the interview and a review of the asylum request fail to elicit evidence of fear of returning on account of any of the enumerated grounds, and the APSO believes that the claimant has a fear but is unable to articulate the reason for such fear, the APSO should ask the following questions:

Why did you leave your country?

What do you think would happen to you if you returned to ————?

Why do you wish to come to the United States?

Have you had any problems with the authorities or other group(s) while in ————? If so, please explain. If so, when was that? Do you know anyone else who has had problems with the authorities or other group(s) while in ————?

Have you ever been arrested or detained for any reason? Do you know anyone who has?

If you went back to ————, where would you live and work?

Are you afraid to return? If so, why?

Have you or any member of your family ever done anything in ———— which you think might cause you problems if you were to return? If so, please explain.

Did you belong to any organization(s) in ————?

Do you know anyone from ———— who has been harmed for any reason?

/s/ Ricardo Inzunza
RICARDO INZUNZA
Deputy Commissioner

EXHIBIT I TO DECLARATION OF JOHN W. CUMMINGS

ASYLUM PRE-SCREENING: GUANTANAMO BAY

OBJECTIVE: In light of what is known about current country conditions to identify interdicted asylum seekers expressing fear of return based on characteristics and/or circumstances which might lead a reasonable person to fear being targeted upon return to Haiti for possible persecution on account of race, religion, nationality, membership in a particular social group or political opinion.

(References: INS Director of Asylum Memorandum of March 1, 1991, INS Deputy Commissioner Memorandum of Nov. 22, 1991 and Interview Record).

The INS Pre-Screening decision, however, does not imply that the Asylum Pre-Screening Officer (APSO) *excludes* the possibility of returnees being harmed on account of personal vendetta, random violence or civil strife, either at home or upon their return by the USG to Port-au-Prince.

PRE-SCREENING CATEGORIES:

1.— Little or no fear expressed: departure primarily for economic reasons.

2.— Fear expressed, but on account of personal vendetta, general conditions, random violence or civil strife.

3.— Fear expressed, but details do not establish credibility of the claim and/or its nexus to one of the five statutory grounds.

4.— Fear expressed and details establish credibility and its nexus to one of the five statutory grounds.

/s/ Gregg Beyer

EXHIBIT J. TO DECLARATION OF JOHN W. CUMMINGS

Memorandum

Subject Interviews of "Screened In" Persons Subject to Medical Exclusion

Date February 29, 1992

To John Cummings
INS/GTMO

From Grover Joseph Rees[,] General Counsel

As you know, there are a number of persons at the naval base in Guantanamo who have been "screened in" as possible refugees but who have been determined to have a communicable disease of public health significance.

The Immigration and Nationality Act (INA) requires that persons with communicable diseases of public health significance "shall be excluded from admission into the United States." INA § 212(a)(1). With respect to persons who are determined to be refugees, however, the Act provides that the Attorney General may waive the medical exclusion "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." *Id.* § 207(c)(3). Such a waiver must be in writing and shall be granted only on an individual basis following an investigation. *Id.*

The Act further provides that the Attorney General may temporarily parole aliens into the United States "for emergent reasons or for reasons deemed strictly in the public interest." *Id.* § 212(d)(5)(A). Such parole does not constitute an admission into the United States and confers no immigration or refugee status. *Id.* Moreover, a person who is a refugee may be paroled into the United States (rather than admitted as a refugee under the formal refugee admission process) only when the Attorney

General finds parole to be "require[d]" by "compelling reasons in the public interest." *Id.* § 212(d)(5)(B).

With respect to a person whose application for parole is premised on the possibility that he or she may be a refugee, but who has been determined to have a communicable disease of public health significance, the judgment with respect to whether parole is required by "compelling reasons in the public interest" should be informed by the same factors that would justify a waiver of the medical exclusion if the person were to seek admission as a refugee. That is, the waiver must be justified "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." *Id.* § 207(c)(3). At a minimum, this requires a determination that the person is in fact a refugee.

Accordingly, any person "screened in" as a possible refugee who has been determined to have a communicable disease that is not curable should be given an interview to determine whether he or she is a refugee within the definition of INA § 101(a)(42). In the case of a Haitian national in Guantanamo, this definition requires a finding that the person is unable or unwilling to return to Haiti because of a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. This finding is identical to that required to grant asylum or refugee status. The interview should therefore be identical in form and substance, or as nearly so as possible, to those conducted by asylum officers to determine whether asylum should be granted to an applicant already in the United States.

Interviews should be conducted according to the usual standards and techniques for asylum interviews. *See* Interview Checklist, INS Asylum Branch Procedures Manual and Operations Instructions, p. 121 (March 1992). An Asylum Assessment should be prepared for each applicant, in accordance with the assessment format set

forth in the Procedures Manual and Operations Instructions. *See id.* at 124-25. All assessments should be forwarded to the Director of the Asylum Branch. When the interviewing asylum officer determines that an applicant is not credible, or that the facts adduced in the interview are insufficient, even if true, to establish a well founded fear of persecution within the definition of the Act, this determination should be noted in the assessment along with the reasons therefor. When the interviewing officer determines that an applicant appears credible and that the facts adduced would, if true, establish a well founded fear of persecution, the assessment will be forwarded to the State Department for information concerning the accuracy of the applicant's assertions about his or her experiences and about country conditions. *See* 8 C.F.R. § 208.11.

These procedures should be followed only with respect to persons whose communicable diseases of public health significance are not curable. Persons whose diseases are susceptible of prompt treatment, and cure, and who would not thereafter be medically excludable, should be handled in accordance with established procedures pending further guidance.

EXHIBIT K TO DECLARATION OF
JOHN W. CUMMINGS

PART III, ATTACHMENT B

INTERVIEW CHECKLIST

INCLUSION

——UNWILLING/UNABLE TO RETURN

——SUBJECTIVE FEAR (What indications of genuine fear?)

——OBJECTIVE BASIS (Past Persecution?)

——PERSECUTION OF OTHERS SIMILARLY SITUATED

——Any pattern or practice of persecution in country? What happened? Who did it?

——WELL-FOUNDED

——Belief or characteristic persecutor seeks to overcome?

——Is persecutor aware or could he become aware of this?

——Is persecutor capable and/or inclined to punish applicant?

——Is fear based upon one of five (5) grounds?

——Would a "reasonable person" fear? (fear may be "significantly less than clearly probable")

——CREDIBILITY

——Is testimony believable, consistent, detailed?

——Obtain explanations of all issues which put credibility in doubt

—If found not credible, explain why

MANDATORY BARS EXCLUSION

——PERSECUTOR

——PARTICULARLY SERIOUS CRIME INSIDE U.S./ AGGRAVATED FELONY

——SECURITY RISK

——FIRM RESETTLEMENT (Relevant only to asylum, not withholding)

DISCRETION (ONLY WITH ASYLUM,)
NOT WITHHOLDING)

——PARTICULARLY SERIOUS CRIME OUTSIDE U.S., FRAUD, AVOIDANCE OF REFUGEE PROCESSING

——MUST BALANCE ANY NEGATIVE FACTORS WITH POSITIVE FACTORS SUCH AS POSSIBILITY OF PERSECUTION, FAMILY TIES IN U.S., etc.

ADDTIONAL MANDATORY BARS—
WITHHOLDING ONLY

——Conviction of praticularly serious crime outside U.S.

——Reasons to believe a serious, non-political crime outside U.S.

EXHIBIT L TO DECLARATION OF
JOHN W. CUMMINGS

PART III, ATTACHMENT C-1

ASSESSMENT SHEET

BHRHA/ASY
DEPARTMENT OF STATE
ROOM 7802
WASHINGTON, D.C. 20520

APRU
MAIN JUSTICE
ROOM 6213
WASHINGTON, DC 20520

DATE _____

ATTACHED ARE COPIES OF A REQUEST FOR ASYLUM (I-589) AND SUPPORTING DOCUMENTATION FOR THE BELOW ATTACHED ALIEN.

APPLICANT: _____

A-NUMBER: _____

COUNTRY: _____

INS OFFICE: _____

ADDRESS: _____

_____

_____

INTERVIEWER'S NAME: _____

_____

FROM: BHRHA A-NUMBER _____

TO: _____

☐ BHRHA HAS REVIEWED THE APPLICATION IN THE ABOVE CASE AND HAS NO ADDITIONAL INFORMATION OR ANALYSIS.

☐ BHRHA COMMENTS ON THE ABOVE CASE ARE ATTACHED.

A-NUMBER: ———

ASSESSMENT SHEET

PRELIMINARY ASSESSMENT: (Complete for *ABC* cases only)

—— Grant
—— Deny

REQUEST BASED ON:

—— Race
—— Nationality
—— Religion
—— Political Opinion
—— Membership in Particular Social Group

DOCUMENTS:

—— Specific
—— Generalized
—— Relevant
—— Irrelevant
—— No Documentation

VERBAL TESTIMONY:

—— Specific
—— Generalized
—— Consistent with I-589
—— Inconsistent with I-589 (explain below)
—— Credible
—— Not credible

SUMMARY:

PART III, ATTACHMENT C-2

ASSESSMENT—WRITING FORMAT

I INTRODUCTION

Applicant is a —— year old (male/female) native and citizen of country who entered the United States on *date* and was admitted as a status (*or* entered without inspection).

II BASIC LEGAL CLAIM

A) WHO does the applicant fear?

—Government organization

—Non-government organization

—Individual

B) WHAT does applicant fear?

—Type of harm or mistreatment

C) "On account of"

—Indicate upon which of the enumerated grounds the claim is based

EXAMPLES:

Applicant bases his claim for asylum on political opinion because he fears the government wants to harm him for his refusal to join the military.

Applicant is afraid that the police will imprison her because of her religion and political opinion.

Applicant is afraid that the military will harm him on account of imputed political opinion.

III APPLICANT'S TESTIMONY—An elaboration of the basic legal claim

—Describe the factual account supporting applicant's claim

—Chronological order is useful

—Indicate why applicant is afraid

—Is applicant afraid of being singled out for persecution?

—Is there a pattern or practice of persecution of people similarly situated to applicant?

IV COUNTRY CONDITIONS

Include background material on general country conditions. Do general country conditions support the applicant's story?

V CREDIBILITY

Is story detailed? specific? internally consistent?

VI LEGAL ANALYSIS/CONCLUSION

Apply the law to the facts of the case. Does applicant have a well-founded fear?

STYLE FOR WRITING ASSESSMENTS

In the Decision Writing Course you were given a format for writing assessments. You were told that the assessment was to be streamlined so that it could easily be converted to a Notice of Intent to Deny, if a denial was contemplated. This paper will suggest a writing style to be used when preparing decisions on asylum applications.

The basic rule is to remember that the writing is used to respond to an applicant's request for asylum in the United States. The difficulty in preparing these decisions comes from the need to insert case citations and references to regulation in the body of the decision. The challenge is to write in a style that can be understood by the applicant and still contain the necessary legal basis. Here are some helpful hints:

1. Choose words that are in common usage.
2. Avoid "loaded terms" which may have a meaning in Immigration Law which is unrelated to normal usage. For example, "persecuted" is a legal conclusion in our work and should be used only when you have determined that it meets our definition.
3. Use case citations only when the holding actually fits the facts of the case on which you are working. Your legal analysis will usually occur in the concluding paragraphs of the assessment and Notice of Intent to Deny.
4. Be as a concise as possible without losing legal sufficiency.
5. Notices of Intent to Deny and Final Denials do not need to be written in an accusatory style. The applicant has not violated any law by applying for asylum.
6. Write simple declaratory sentences.

7. Organize your thoughts by referring to your notes before writing the decision.

8. Avoid generalizations. We want to address the facts unique to each case.

Your decisions will be reviewed by your supervisor and will be open to review by Headquarters, State Department, the Asylum Policy and Review Unit, and the Immigration Judges. Your goal is to write clear and understandable decisions which will withstand legal challenges and public scrutiny.

DEFENDANTS' EXHIBIT NO. 148

Letter from Edwin D. Williamson to Timothy E. Flanigan, Dec. 11, 1991

Memorandum for Edwin D. Williamson from Timothy E. Flanigan, Dec. 12, 1991

UNITED STATES DEPARTMENT
OF STATE

The Legal Adviser
Washington, D.C. 20520

December 11, 1991

Mr. Timothy E. Flanigan
Acting Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
10th and Constitution Avenue, N.W. 20530
Rm. 5224

Re: *Haitian Refugee Center, Inc. v. Baker*

Dear Tim:

I am writing to provide you with the formal opinion of the Department of State on the question whether the *non-refoulement* obligation of Article 33 of the 1951 U.N. Convention Relating to the Status of Refugees ("the Refugee Convention")[1] imposes obligations on the United States with respect to refugees outside United States territory. We have previously and publicly taken the position that the obligation applies only to persons within the territory of a Contracting State. This remains our firm view. For the reasons indicated below, the Department respectfully requests that you reconsider and withdraw the apparently contrary legal conclusion reflected in the

[1] The United States never became a party to the Refugee Convention. In 1957, the United Nations completed a Protocol to the Refugee Convention that incorporated Articles 2-34 of the Convention and removed the temporal and geographic limitations on the definition of "refugee" contained in Article 1 of the Convention. The United States acceded to the Protocol on November 1, 1988, and as a result is bound by Article 33 of the Refugee Convention. 19 U.S.T. § 223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

opinion of the Office of Legal Counsel of August 11, 1981. In view of the importance of this conclusion to the litigation noted above, we request that you provide us with your views in as expeditious a manner as possible.

The relevant principles for interpreting a treaty are accurately reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, U.N. Doc. A/Conf. 39/27 (1969) ("Vienna Convention"). Although the United States has not ratified the Vienna Convention, it is a signatory. A number of U.S. courts have applied those articles in interpreting treaties in cases before them. *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31, 36 (2d Cir. 1975), *cert. denied*, 429 U.S. 590 (1976); *Coplin* v. *United States*, 6 Cl. Ct. 115 (1984); *rev'd on other grounds*, 761 F.2d 688 (Fed. Cir. 1985); *Aeriliens* v. *Regan*, 817 F. Supp. 1082, 1086 n.15 (Ct. Int'l Trade 1985); *Darby* v. *Seaboard World Airlines, Inc.*, 575 F. Supp. 1134, 1138 (E.D.N.Y. 1983), *rev'd on other grounds*, 737 F.2d 172 (2d Cir. 1984).

Under Article 31 of the Vienna Convention, the starting point of treaty interpretation is "the ordinary meaning" of the terms of the treaty in their context, and in light of the object and purpose of the treaty. The context includes, among other things, "[a]ny agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty." Also to be considered is the subsequent practice in applying the treaty if the practice "establishes the agreement of the parties" regarding the treaty's interpretation. Under Article 32, the negotiating history of a treaty may also be consulted, either to confirm the results of an analysis under Article 31 or if the analysis under Article 31 leaves the meaning ambiguous or leads to an absurd or unreasonable result. These principles all lead to the conclusion that Article 33 of the Refugee Convention did not create obligations on States with respect to refugees outside their territory.

The Text and Negotiating History of Article 33

Article 33 provides as follows:

> 1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of the particularly serious crime, constitutes a danger to the community of that country.

The word "expel" in Paragraph 1 clearly refers to the treatment of refugees in a State's territory. Paragraph 2 also clearly refers to refugees in a State's territory in excluding certain refugees from the protection of Paragraph 1.

Article 33 also uses the word "return." The French term for the word "return" is included in the official English version of the treaty, a drafting device indicating that the word "return" is to be understood as synonymous with the French "refouler."[2] The French was included in the English text for the express purpose of ensuring that the word "return" would be understood as applying only to refugees within a State's territory. During the final negotiating session for the Refugee Convention in July 1951, the Conference of Plenipotentiaries (representing 26 States, including the United States) directly confronted the questions of how the word "return" in Article 33 (which was then Article 28) would be interpreted. At the session of July 11, the Swiss representative noted that the French word "*refoulement*" had some ambiguity, but that it "could not . . . be applied to a refugee who had not yet entered the territory of a country." The Swiss representative also expressed concern that Article 33 would be read to "impl[y] the existence of two categories of refugees: refugees who were liable to be expelled, and those who were liable to be returned." He therefore thought it essential that the drafting States "take a definite position with regard to the meaning to be attached to the word 'return'" and stated his government's understanding that the word "return," like the word "expel," in fact "applied solely to refugees who had already entered a country, but were not yet resident there."

The Swiss representative made clear that his country's assent would depend on being assured of this reading, one implication of which would be that Article 33 would not require a state "to allow large groups of persons claiming refugee status to cross its frontiers." The representative of France affirmatively agreed with this interpretation and indicated that "[i]t was only the idea of what was generally meant by 'expulsion' that should be retained." The negotiating record for that day reflects no disagreement with this view.[3] U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and

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[2] The French text of article 33(1) reads as follows:

> Aucun des Etats Contractants n'expulsera ou ne refoulera, de quelque maniere que ce soit, un refugie sur les frontieres des territoires ou sa vie ou sa liberte serait meances en raison de se race, de sa religion, de sa nationalite, de son apparienence a un certain groupe social ou de ses opinions politiques.

[3] At an earlier and lower level stage in the drafting, when the Convention was being considered by an Ad Hoc Committee, the expert from the United States expressed the view that Article 33 should cover non-admittance at the frontier. The United States had different representation at the Conference of Plenipotentiaries and this view was apparently not reasserted by the United States. In any event, this view was not adopted by the Conference.

Stateless Persons (16th mtg.) at E, U.N. Doc. A/CONF. 2/SR.16 (1951).

The limited meaning of the word "return" in Article 33 was reaffirmed at the second and final reading of the draft Convention, on July 25, 1951. The negotiating record for that day records that the Dutch representative recalled the eariler discussion as follows:

> The Swiss representative had expressed the opinion that the word "expulsion" related to a refugee already admitted into a country, whereas the word "return" (*"refoulement"*) related to a refugee already within the territory but not yet resident there.

The Dutch representative went on to say that this was an important point for his government because of its implications with respect to "large groups of refugees seeking access to its territory." Noting that the representatives of Belgium, Germany, Italy, the Netherlands, and Sweden, as well as Switzerland, had supported this interpretation, he asked that it be placed on the record.

The President of the Conference ruled that the interpretation should be placed on the record since no objection had been expressed. The British delegate added that the word "return" had been chosen as the nearest equivalent to *"refoulement,"* and that he understood that the word "return" in this context had no broader meaning—*i.e.*, no meaning broader than the French, which had already been clarified as applying only to a refugee within the territory. The President then suggested that the French word be included in brackets whenever the word "return" was used. U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (35th mtg.) at 21-22, U.N. Doc. A/CONF.2/SR.35 (1951). The final text of Article 33 was adopted by a vote of 20 for, 0 against, and 3 abstentions. *Id.* at 25.

In short, the negotiating history reflects a deliberate consideration of the meaning of the word "return," a

clear understanding that it referred only to refugees within the State's territory, and a related understanding that Article 33 created no obligations with respect to refugees outside the territory, including no obligation to refugees massing at the border. A number of countries whose support for the Convention was of critical importance would never have agreed to Article 33 but for the explicit rejections of the possibility of reading "return" to apply to refugees outside their territory.

This record is dispositive, whether it is taken under Article 31 of the Vienna Convention to reflect an "agreement relating to the treaty" made between all the parties in connection with its conclusion, to confirm an "ordinary meaning" analysis, or to resolve an ambiguity.[4]

In *Haitian Refugee Center, Inc.* v. *Gracey*, 809 F.2d 394 (D.C. Cir. 1987), Judge Edwards, the only judge to have considered the issue, concluded unequivocally—and with specific reference to the Haitian interdiction program at issue here—that "Article 33 in and of itself provides no rights to aliens outside a host country's borders." *Id.* at 840 (Edwards, J., dissenting in part and concurring in part). The other judges did not reach the merits, voting to dismiss on standing grounds.

Furthermore, the Supreme Court has observed that the United States acceded to Article 33 based upon the view that existing U.S. immigration legislation already provided the protections required by it; that Article 33 could be implemented through the then existing section 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h) (1976); and that section 243(h) applied only

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[4] Reading "return" as applying to refugees outside the territory would lead to the absurd result that a refugee on the high seas would have more protection than a refugee already in the territory of a State, since Article 33(2)'s exception to the non-refoulement obligation for a refugee who is a danger to the State can only be invoked if the refugee is in the country.

to deportation of refugees already in the United States. *See INS* v. *Stevic*, 67 U.S. 407, 415, 417-18 (1984).

Subsequent Practice

The protracted and unsuccessful international effort to supplement the Refugee Convention with a Convention on Territorial Asylum, a central goal of which was to codify a prohibition against rejection of refugees at the frontier, further evidences an understanding of the limitations of the Refugee Convention and demonstrates the reluctance of the international community to broaden its legal commitments in the area of refugees and immigration.

The effort to draft a territorial asylum convention was preceded by adoption of the non-binding Declaration on Territorial Asylum by the U.N. General Assembly in December 1967. Paragraph 1 of Article 3 of the Declaration carried forward Article 33's usage of the words "expel" and "return" to refer to persons within the territory of a State. Paragraph 1 is broader than Article 33, however, in that it also includes an explicit prohibition against rejection at the frontier:

> 1. No person [entitled to seek and enjoy asylum from persecution] shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State in which he may be subjected to persecution.
>
> 2. Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.

G.A. Res. 2312, 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967).

It was clearly understood that the Declaration's non-binding "prohibition" on rejection at the frontier, even as limited, went beyond the Convention's Article 33 obligation. *See* Weis, *The United Nations Declaration on Territorial Asylum*, 7 Can. Y.B. Int'l L. 92, 142 (1969). Thus, one distinguished commentator said that, "Article 3(1) of the Declaration on Territorial Asylum, 1967, corresponds to Article 33(1) of the Refugee Convention, but *it extends the rule* to include the prohibition of rejection at the frontier as well." A. Grahl-Madsen, *An International Convention on Territorial Asylum* 33 (2d ed., rev., 1976) (emphasis added).

Work on principles of asylum continued after 1967 with a view toward a binding instrument that would, among other things, extend the precept of *non-refoulement* to protection against rejection at the frontier. Private sector drafting efforts eventually resulted in a draft convention being submitted to the U.N. High Commissioner for Refugees and subsequently to the U.N. Economic and Social Council and, finally, the General Assembly ("UNGA"). The UNGA established a Group of Experts that met in 1975 and then called a Conference of Plenipotentiaries to meet in 1977.

The draft text submitted to the Group of Experts included an obligation for States to use their "best endeavours to grant asylum" to refugees (defined somewhat more broadly than in the Refugee Convention). Article 2 also included the following proposed provision:

> No person shall be subjected by a Contracting State to measures such as rejection at the frontier, return, or expulsion, which would compel him to return directly or indirectly to, or remain in a territory with respect to which he has well-founded fear of persecution, prosecution or punishment . . . .

U.N. Group of Experts on the Draft Convention on Territorial Asylum, *Draft Convention on Territorial Asylum*

at 4, U.N. Doc. A/AC.174/CRF.1 (1975). A later draft continued the separate treatment of the concepts of "rejection at the frontier" and "return" or "expulsion". *See* U.N. GAOR Office of the United Nations High Commissioner for Refugees, *Elaboration of a Draft Convention On Territorial Asylum, Report of the Secretary-General* at 1, U.N. Doc. A/10177/Corr.1 (1975).

The Group of Experts had difficulties with this Article, which it recognized as the most important provision in the draft convention. It settled on a proposed re-wording that became Article 3 and read in part as follows:

> No person entitled to the benefits of this Convention who is in the territory of a Contracting State shall be subjected by such Contracting State to measures such as return or expulsion which would compel him to return to a territory where his life or freedom would be threatened. Moreover, a Contracting State shall use its best endeavours to ensure that no person is rejected at its frontiers if there are well-founded reasons for believing that such rejection would subject him to persecution, prosecution or punishment . . . .

The proposed revision went on to provide for exceptions similar to those contained in Article 33 of the Refugee Convention. U.N. Group of Experts on the Draft Convention on Territorial Asylum, *Report* at 16, 34, U.N. Doc. A/AC.174/MISC.3/GE.75-6119 (1975); *Elaboration of a Draft Convention on Territorial Asylum, Report of the Secretary General* at 1, U.N. Doc. A/10177/Corr.1 (1975).

Significantly, the initial proposal to reword this provision came from the United States, which took the position that "the principle of non-refoulement . . . should only apply to persons in the territory of a Contracting State" and that "with regard to rejection at the frontier, the principle of non-refoulement should not be expressed in absolute terms but that the words 'use their best endeavours' should be employed." *Report* at 14, U.N. Doc. A/AC.174/MISC.3/GE.75-6119. *Compare* Proposal by the Expert of the United States, U.N. Doc. A/AC.174/Informal Working Paper No. 4 (1975) with *Report* at 14-16, U.N. Doc. A/AC.174/MISC.3/GE.75-6119. *See also*, 1975 *Digest of United States Practice in International Law* 156-58.

Efforts to conclude the convention were eventually abandoned, as the Conference on Plenipotentiaries on the Draft Convention on Territorial Asylum failed to adopt the Convention. This record clearly demonstrates that States—including the United States—did not regard Article 33 of the Refugee Convention as protecting refugees outside their territory, and that they were unwilling to assume such an obligation as a matter of international law.

The United States Understanding at the Time of Ratification

When President Johnson sent the Protocol to the Senate in 1968, he stated that it would require no changes in domestic law. Special Message to the Senate Transmitting the Protocol Relating to the Status of Refugees, 2 *Pub. Papers* 428 (1968). The Report of the Secretary of State, which accompanied the President's message to the Senate, specifically indicated that Article 33 of the Refugee Convention was comparable to section 243(h) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1253(h) (1976), and that it could be "implemented within the administrative discretion provided by existing regulations." S. Exec. K, 90th Cong., 2d Sess. VIII (1968). Section 243(h) at that time explicitly applied only to refugees within the United States:

> The Attorney General is authorized to withhold deportation of any alien *within the United States* to any country in which in his opinion the alien would

> be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reasons.

(emphasis added). In short, it was clearly understood at the time of ratification that Article 33 imposed an obligation only with respect to refugees already within the United States.

Subsequent Interpretive Statements

U.S. obligations under the Convention and Protocol were reviewed after a November 1970 incident in which a Lithuanian seaman (Kudirka) jumped ship in U.S. territorial waters but was turned back to the Soviets by the U.S. Coast Guard. This review culminated in the issuance of new guidelines by the Department of State for the treatment of defectors. These guidelines contained a statement that, as a party to the Protocol, "the United States has an international treaty obligation for its implementation *within areas subject to the jurisdiction of the United States.*" Department of State Bulletin 124-25 (Jan. 31, 1972) (emphasis added).

The limited territorial applicability of Article 33 was recalled again in connection with consideration of what became the Refugee Act of 1980. The bill as it emerged from the Senate and the House of Representatives in 1979 contained proposed amendments to Section 243(h) of the I.N.A. that essentially tracked the language of Article 33. The House report noted, in explaining the amendment, that the U.N. Protocol "seeks to insure fair and humane treatment for refugees *within the territory of the contracting states*," and said that the House amendment "conforms United States statutory law to our obligations under Article 33 . . . ." House Comm. on the Judiciary, *The Refugee Act of 1979*, H.R. Rep. No. 608, 96th Cong., 1st Sess. 17 (1979) (emphasis added).

A similar understanding of the territorial limits of Article 33 was expressed by the Department of State to

Congress in 1980 during hearings on the situation in Liberia and the question of diplomatic asylum. At these hearings, the Deputy Legal Adviser for the Department testified, "The obligation of a party to the Protocol . . . is not to return an applicant for asylum who presents his claim for asylum inside the territory of the United States." *The Situation in Liberia, Spring 1980-Update; Hearing before the Subcomm. on Africa of the House Comm. on Foreign Affairs*, 96th Cong., 2nd Sess. 10 (1980) (testimony of William T. Lake, Deputy Legal Adviser, U.S. Dep't of State).

For reasons unclear, in connection with institution of the Haitian Interdiction Program, the Office of Legal Counsel appears to have concluded that Article 33 applied outside U.S. territories. The issue, however, was not thoroughly analyzed in that opinion.[5]

In 1985, in connection with the filing of the brief for the United States as defendant-appellee in *Haitian Refugee Center, Inc.* v. *Gracey*, 809 F.2d 794 (D.C. Cir. 1987), the Department reviewed, elaborated, and concurred in arguments made by the Department of Justice to the effect that Article 33 does not protect refugees outside the territory of the United States.

In 1989, the Department of State testified before the House Committee on the Judiciary Subcommittee on Immigration, Refugees and International Law concerning the Haitian Interdiction Program, and again stated its view that Article 33 does not impose obligations on States with respect to refugees outside their territory. *Haitian Detention and Interdiction: Hearing Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 36-43 (1989) (statement of Alan J. Kreczko, Deputy Legal Adviser, Dep't of State). Later that year the United States also stated this position clearly on the

---

[5] *See Proposed Interdiction of Haitian Flag Vessels*, 5 Op. Off. Legal Counsel 242, 248 (1981).

record at the annual meeting of the Executive Committee of the U.N. High Commissioner for Refugees. This statement was reported in the official record of the meeting as follows:

> As a matter of practice the United States authorities did not return persons who were likely to be persecuted in their countries of origin, and on their arrival at the border they were all given the opportunity to make an asylum claim. That was the practice, and in fact the policy of the United States, and not a principle of international law with which it conformed. . . .
>
> Although the United States was pursuing a policy based on humanitarian considerations, that policy was not inspired by any international obligation. It did not consider that the non-refoulement obligation under article 33 of the Convention included an obligation to admit an asylum-seeker. The obligation contained in the Convention pertained only to persons already in the country and not to those who arrived at the frontier or who were travelling with the intention of entering the country but had not yet arrived at their destination. Furthermore, there was nothing to suggest that an obligation to admit asylum-seekers had ripened into a rule of customary international law.

Executive Committee of the High Commissioner's Programme, *Summary Record of the 442nd Meeting* at 16, U.N. Doc. A/AC.96/SR.442 (1989). No disagreement with this view was expressed.

Our view is not changed by the fact that the U.N. High Commissioner for Refugees ("UNRCR") now advocates recognition of an extraterritorial norm of *non-refoulement*.[6] UNRCR was established by the U.N. General Assembly even before the Refugee Convention was completed, *and* has never been charged with a definitive role in the interpretation of the Convention. That role is given to the International Court of Justice by Article 38 of the Convention and by Article IV of the Protocol. Similarly, the consensus-based Executive Committee ("EXCOM") of UNRCR (comprised of States both party and non-party to the Refugee Convention, *and* of States party to additional, more expansive conventions) has no authority to interpret legal obligations of States. UNRCR itself has recognized that the EXCOM conclusions have no legal effect, but instead provide guidance for States in developing their policies on refugee issues. *Statement of Mr. Arnaout, Director, Division of Refugee Law and Doctrine, UNRCR*, in Executive Committee of the High Commissioner's Programme, *Summary Record of the 431st Meeting* at 11-12. U.N. Doc. A/AC.96/53.431 (1988).

[6] Prince Sadruddin Aga Kahn recognized during his tenure as U.N. High Commissioner for Refugees that there was no obligation of *non-refoulement* with respect to refugees outside a State's territory. S. Aga Kahn, *Lectures on Legal Problems Relating to Refugees and Displaced Persons given at the Hague Academy of International Law* (August 4-6, 1976) 25-26. *See also* G. Goodwin-Gill, *The Refugee in International Law*, 75 & n.26 (1983).

Summary

Article 33 of the Refugee Convention was completed on the understanding that it would not have extraterritorial effect. This understanding has been confirmed by subsequent practice by States party to the Convention and Protocol, particularly in the context of considering the draft Convention on Territorial Asylum. The United States has repeatedly recognized the limited scope of Article 33, including in 1968, at the time of accession to the U.N. Protocol; in 1972, after the Kudirka incident; in 1975, while considering the draft Convention on Territorial Asylum; in 1979-80, during consideration of the Refugee Act of 1980 and the situation in Liberia; and

consistently since 1985. Contrary interpretations apparently made in 1981 are in error. Again, in light of the pending litigation, we would appreciate receiving the views of your office as soon as possible.

Sincerely yours,

/s/ Edwin D. Williamson
EDWIN D. WILLIAMSON

U.S. DEPARTMENT OF JUSTICE
Office of Legal Counsel

Washington, D.C. 20510

December 12, 1991

Office of the
Assistant
Attorney General

MEMORANDUM FOR EDWIN D. WILLIAMSON
Legal Adviser
Department of State

Re: *Article 33 of the Refugee Convention*

We have reviewed your letter opinion dated December 11, 1991, in which you conclude that Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees (Refugee Convention) does not impose any domestic legal obligations on the United States with respect to individuals interdicted outside its territory as part of an effort to control mast illegal migration to the United States. Letter from Edwin D. Williamson to Timothy E. Flanigan, December 11, 1991 (Williamson Letter). For the reasons outlined in your letter and for the additional reasons discussed below, we concur in your conclusions.

The United States adheres to Articles 2 through 34 of the Refugee Convention by virtue of the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 (the Protocol), to which the United States acceded on November 1, 1968. The official English version of Article 33 provides in part:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom

> would be threatened on account of his race, religion, nationality, memebrship of a particular social group or political opinion.

19 U.S.T. at 6276. Article 33 thus imposes an obligation on the contracting parties not to "expel or return ("refouler")" refugees under certain circumstances.

The word "expel" in Article 33 clearly refers to the treatment to be afforded potential refugees found within a state's territory. Paragraph 1 also uses the word "return," followed by the French term "refouler." As you note in your letter, the history behind the insertion of "refouler" in the Convention demonstrates that the representatives of the nations that negotiated the Convention intended that the English word "return" not be construed so as to make the treaty applicable to persons outside the territory of a contracting state. Williamson Letter at 3-5.[1] Because both "expel" and "return ("refouler")" refer only to the treatment to be afforded individuals found within the territory of a contracting state, the Refugee Convention and the Protocol do not impose any legal obligation with respect to individuals interdicted outside the United States.

The Supreme Court, in its review of the legislative history of the United States' accession to the Protocol, has also observed that the United States acceded to Article 33 based upon the view that Article 33 could be implemented through the then-existing section 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h) (1976 ed.), and that section 243(h) applied *only* to deportation of refugees already in the United States. *See INS* v. *Stevic*,

[1] Your Department has also formally communicated to Congress its view that Article 33 extends only to persons who have gained entry into a territory of a contracting state. *Haitian Detention and Interdiction: Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 36-43 (1989) (statement of Alan J. Kreczko; Deputy Legal Adviser, Department of State).

467 U.S. 407, 415, 417-18 (1984). The legislative history of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, supports this view of Article 33: the House Committee Report states that the Refugee Convention was intended to "insure fair and humane treatment for refugees *within the territory of the contracting states*." H.R. Rep. No. 608, 96th Cong., 1st Sess. 17 (1979) (emphasis added).

Judge Edwards in *Haitian Refugee Center* v. *Gracey*, 809 F.2d 794 (D.C. Cir 1987), concluded unequivocally—and with specific reference to the Haitian interdiction program at issue here—that "Article 33 in and of itself provides no rights to aliens outside a host country's borders." *Id.* at 840 (Edwards, J., dissenting in part and concurring in part). The other two judges on the *Gracey* panel decided that the plaintiff lacked standing to challenge the interdiction program and decided the case on that ground, a decision from which Judge Edwards dissented. Neither of the judges in the majority, however, expressed any disagreement with or reservations about Judge Edwards' analysis of the underlying merits issues, including his discussion of Article 33 and his conclusion that it provides no rights to aliens outside a state's borders.

We note, moreover, as an independent ground for our conclusion, that the Protocol by which the United States adhered to the Convention is not self-executing for domestic law purposes. Accordingly, the Protocol itself does not create rights or duties that can be enforced by a court.

Under the Supremacy Clause of the Constitution, treaties made pursuant to the Constitution's procedures are part of the "supreme Law of the Land . . . ." U.S. Const., art. VI, cl. 2. Some treaties, however, merely impose obligations under international law that the United States, as a contracting party, must perform particular acts, without themselves creating any obligations under domestic law. In such cases the international obligation

must be "executed" through domestic legislation before the obligation becomes effectively the law of the land. Thus, in *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), Chief Justice Marshall recognized that not all treaties are self-executing:

> [A treaty] is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

See also Memorandum for Michael J. Matheson, Deputy Legal Adviser, from Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, March 19, 1985 (Tarr Memorandum), at 4-5.

Whether a treaty is self-executing is controlled by the intent of the United States as a contracting party. *See British Caledonian Airways* v. *Bond*, 665 P.2d 1153, 1160 (D.C. Cir. 1981); *United States* v. *Postal*, 589 F.2d 862, 876 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); *Diggs* v *Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976). "The parties' intent may be apparent from the language of the treaty, or, if the language is ambiguous, it may be divined from the circumstances surrounding the treaty's promulgation." *Postal*, 589 F.2d at 876.

The language of the Protocol by which the United States adhered to the Refugee Convention demonstrates that the United States did not intend that the Convention, as adhered to, would be self-executing. In particular, Article III of the Protocol provides that the signatories are to communicate to the United Nations the "laws and regulations which they may adopt to ensure the application of the present Protocol." 19 U.S.T. at 6226. *Cf.* Postal, 589 F.2d at 876-77 (treaties that "expressly provide for legislative execution" are "uniformly declared executory" and therefore require further legislative action to bring the treaty into effect). Moreover, such a provision would have been unnecessary if the Refugee Convention were self-executing. *Cf.* Protocol, art. VI(b), 19 U.S.T. 6227 (any signatory with federal form of government obligated to bring the articles of Refugee Convention to the notice of the constituent states if those articles comes within the states' exclusive legislative jurisdictions). Thus, the Protocol by its own terms plainly contemplates the need for implementing legislation by its signatories.

Furthermore, the understanding of the President and the Senate in adopting the Protocol was that the United States' obligations under the Refugee Convention, pursuant to the Protocol, would not be self-executing. Specifically, the President and Senate clearly believed that pre-existing domestic law governing refugees—which applied only to persons already in the United States—would suffice to implement the Refugee Convention and the Protocol.[2] *See also Stevic*, 467 U.S. at 417-18. We also note that the Second Circuit, the only circuit court to address the question directly, has concluded that the Protocol is not self-executing. *Bertrand* v. *Sava*, 684 F.2d 204, 218-19 (2d Cir. 1982).

Because the Protocol is not self-executing, its provisions cannot be enforced by a private right of action in a

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[2] *See, e.g.*, S. Exec. K, 90th Cong., 2d Sess. III (1968) (message from Pres. Johnson) ("most refugees in this country already enjoy the protection and rights which the Protocol seeks to secure for refugees in all countries"); *id.* at VIII (report of Secretary of State Rusk) ("[Article 33] is comparable to Section 243(h) of the Immigration and Nationality Act . . . and it can be *implemented* within the administrative discretion provided by existing regulations") (emphasis added); S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 4 (1966) (testimony of State Dept. official) ("refugees in the United States have long enjoyed the protection and the rights which the protocol calls for").

United States court.[3] It is well-established that individuals may directly seek enforcement of a treaty's provisions only when "the treaty . . . expressly or impliedly provides a private right of action." *Tel-Oren* v. *Libyan Arab Republic*, 736 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985). *See also Head Money Cases*, 112 U.S. 580, 598-99 (1884); *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985) ("if not implemented by appropriate legislation [treaties] do not provide the basis for a private lawsuit unless they are intended to be self-executing"); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979); *Linder* v. *Calero Portocarrero*, 747 F. Supp. 1452, 1462-63 (S.D. Fla. 1990); *Haitian Refugee Cent.* v. *Gracey*, 600 F. Supp. 1396, 1405-06 (D.D.C. 1985), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987).

A one-page opinion of this Office, and one sentence in another Office of Legal Counsel opinion, might be read to suggest that refugees interdicted on the high seas enjoy certain rights under the Protocol adopting the Refugee Convention. *See* Memorandum for the Attorney General from Assistant Attorney General Olson, 5 Op. Off. Legal Counsel 242, 248 (1981) ("Individuals who claim that they will be persecuted . . . must be given an opportunity to substantiate their claims [under Article 33]."); Memorandum for the Associate Attorney General from Larry L. Sims, Deputy Assistant Attorney General (Aug. 5, 1981) ("Those who claim to be refugees must be given a chance to substantiate their claims [under Article 33]."). Among other things, those memoranda did not

[3] Of course, even were the Protocol deemed to be self-executing, the Protocol would need to be examined to see if it conferred any legally enforceable rights upon individuals interdicted outside the territory of the United States. *See also* Tarr Memorandum at 4 n.5. We have already concluded above that the Protocol does not confer any legally enforceable rights upon such individuals.

address whether the Protocol adopting the Refugee Convention is self-executing. To the extent that those memoranda could be read to suggest that Article 33, as adopted by the Protocol, imposes a judicially enforceable obligation on the United States with respect to individuals interdicted beyond its territorial boundaries, those memoranda are incorrect.

Please let us know whether we can be of further assistance.

/s/ Timothy E. Flanigan
TIMOTHY E. FLANIGAN
Acting Assistant
Attorney General

DEFENDANTS' EXHIBIT NO. 150

UNITED NATIONS

GENERAL
ASSEMBLY

GENERAL

A/CONF.2/SR.16
23 November 1951

ENGLISH
ORIGINAL: ENGLISH AND FRENCH

Dual distribution

CONFERENCE OF PLENIPOTENTIARIES ON THE STATUS OF REFUGEES AND STATELESS PERSONS

SUMMARY RECORD OF THE SIXTEENTH MEETING

held at the Palais des Nations, Geneva,
on Wednesday, 11 July 1951, at 3 p.m.

[page 6]

* * * * *

Mr. ZUTTER (Switzerland) said that the Swiss Federal Government saw no reason why article 28 should not be adopted as it stood; for the article was a necessary one. He thought, however, that its wording left room for various interpretations, particularly as to the meaning to be attached to the words "expel" and "return". In the Swiss Government's view, the term "expulsion" applied to a refugee who had already been admitted to the territory of a country. The term "*refoulement*", on the other hand, had a vaguer meaning; it could not, however, be applied to a refugee who had not yet entered the territory of a country. The word "return", used in the English text, gave that idea exactly. Yet article 28 implied the

existence of two categories of refugee: refugees who were liable to be expelled, and those who were liable to be returned. In any case, the States represented at the Conference should take a definite position with regard to the meaning to be attached to the word "return". The Swiss Government considered that in the present instance the word applied solely to refugees who had already entered a country, but were not yet resident there. According to that interpretation, States were not compelled to allow large groups of persons *claiming* refugee status to cross its frontiers. He would be glad to know whether the States represented at the Conference accepted his interpretations of the two terms in question. If they did, Switzerland would be willing to accept article 28, which was one of the articles in respect of which States could not, under article 36 of the draft Convention, enter a reservation.

Mr. ROCHEFORT (France) agreed with the views expressed by the representative of Switzerland. It was only the idea of what was generally meant by "expulsion" that should be retained.

Referring to the amendment submitted jointly by the delegations of France and the United Kingdom (A/CONF.2/69), he observed that the text of the draft Convention admitted the principle that a State could refuse the right of asylum. It was therefore only just that countries which granted that right should be able to withdraw it in certain circumstances. If they could not do so, they would think twice before granting an unconditional right.

* * * * *

[page 11]

Baron van BOETZELAER (Netherlands) supported the Swiss representative's observations. He appreciated the importance of the basic principles underlying article 28 but, as a country bordering on others, the Netherlands was somewhat diffident about assuming unconditional

obligations so far as mass influxes of refugees were concerned, unless international collaboration was sufficiently organized to deal with such a situation. He recalled that the Swiss representative had already referred to the matter of international collaboration in the general discussion at the third meeting.

Mr. THEODOLI (Italy) associated himself with the statements of the Swiss and Netherlands representatives.

He would like some clarification of the words "expel or return". Under article 28, no Contracting State was to expel or return a refugee to a territory where his life or freedom would be in danger. On the other hand, he personally felt that a State could not commit itself not to expel or return large groups of refugees who presented themselves on its territory, and who might endanger public security. The Italian delegation would therefore reserve its position on the article, unless some satisfactory explanation was forthcoming.

Mr. PETREN (Sweden) also agreed with the Swiss, Netherlands and Italian representatives. Although some representatives had spoken in support of the Second additional phrase in the first paragraph of his amendment, the general sense of the Conference appeared to be against it. He would therefore withdraw it, stressing, however, that, as the President had also urged, the text of the article should be interpreted as covering at least some of the situations envisaged in that part of the amendment. [page 12]

Mr. von TRÜTZSCHLER (Federal Republic of Germany) supported the observation of the Netherlands representative concerning countries subject to a large influx of refugees.

Mr. HERMENT (Belgium) drew attention to the fact that in article 28 the prohibition on returning refugees to the frontier could be construed as applying to individuals, but not to large groups. Such was the interpretation placed on it by the Belgian Government.

Mr. ROCHEFORT (France) pointed out that the joint amendment referred to the country in which the refugee was residing. The hypothesis of any large influx of refugees did not therefore enter into question.

The PRESIDENT asked the authors of the joint amendment to explain why they had included the words "in which he is residing". He recalled that article 28 was to apply to refugees who had entered the country of asylum both unlawfully (article 26) and lawfully (article 27).

It appeared from the text of joint amendment that only the country in which the refugee resided would be empowered to expel him if necessary, and that countries through which he passed on his way to refuge would be debarred from doing so. He wondered whether the phrase "in which he is residing" was meant to be interpreted in its broadest sense, namely, "in which he finds himself".

Mr. HOARE (United Kingdom) replied that the President's interpretation was correct so far as the English text was concerned. It might very occasionally be necessary to return the refugee almost immediately to his country of origin. Generally, however, the amendment would affect people who had been resident in the country for a considerable time, and it was for that reason that the word "residing" had been used.

* * * * *

DEFENDANTS' EXHIBIT NO. 151

UNITED NATIONS

GENERAL
ASSEMBLY

GENERAL

A/CONF.2/SR.35
3 December 1951

ENGLISH
ORIGINAL: ENGLISH AND FRENCH

Dual Distribution

CONFERENCE OF PLENIPOTENTIARIES ON THE STATUS OF REFUGEES AND STATELESS PERSONS

SUMMARY RECORD OF THE THIRTY-FIFTH MEETING

held at the Palais des Nations, Geneva,
on Wednesday, 25 July 1951, at 2:30 p.m.

* * * * *

Mr. ROCHEFORT (France) saw no objection to the insertion of those words, but requested that the summary record of the meeting should state that article 33 was without prejudice to the right of extradition.

Baron van BOETZELAER (Netherlands) recalled that at the first reading the Swiss representative had expressed the opinion that the word "expulsion" related to a refugee already admitted into a country, whereas the word "return" (*refoulement*") related to a refugee already within the territory but not yet resident there. According to that interpretation, article 28 would not have involved any obligations in the possible case of mass migration across frontiers—or of attempted mass migrations.

He wished to revert to that point, because the Netherlands Government attached very great importance to the scope of the provision now contained in article 33. The Netherlands could not accept any legal obligations in respect of large groups of refugees seeking access to its territory.

At the first reading the representatives of Belgium, the Federal Republic of Germany, Italy, the Netherlands and Sweden had supported the Swiss interpretation. From conversations he had since had with other representatives, he had gathered that the general consensus of opinion was in favour of the Swiss interpretation.

In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33.

There being no objection, the PRESIDENT *ruled* that the interpretation given by the Netherlands repersentative should be placed on record.

Mr. HOARE (United Kingdom) remarked that the Style Committee had considered that the word "return" was the nearest equivalent in English to the French term "*refoulement*". He assumed that the word "return" as used in the English text had no wider meaning.

The PRESIDENT suggested that in accordance with the practice followed in previous Conventions, the French word "*refoulement*" ("*refouler*" in verbal uses) should be included in brackets and between inverted commas after the English word "return" wherever the latter occurred in the text.

He further suggested that the French text of paragraph 1 should refer to refugees in the singular.

The Swedish suggestion that the words "membership of a particular social group" be inserted in paragraph 1 after the word "nationality" was adopted unanimously.

The two suggestions made by the President were adopted unanimously.

Mr. CHANCE (Canada) pointed out that the word "particular" in the last line of paragraph 2 should read "particularly".

Mr. HOARE (United Kingdom) said that the word "trial" in paragraph 2 should read "final".

It was so agreed.

Mr. HOARE (United Kingdom) observed that paragraph 2 spoke of refugees "convicted by a final judgment of a particularly serious crime." In the original version that clause had been limited to the country of residence. The existing text was the result of a Swedish amendment. He suggested that it might be more consistent to revert to the original wording, and say "convicted by a final judgment in that country", since under what was now paragraph F of article 1 a person who had committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee was excluded from the categories of refugees; he should therefore be considered as also being outside the scope of article 33.

Mr. PETREN (Sweden) explained that his amendment had been intended to cover cases such as, for example, that of a Polish refugee who had been allowed to enter Sweden and who, in passing through Denmark, had committed a crime in that country.

DEFENDANTS' EXHIBIT NO. 152

DECLARATION OF REAR ADMIRAL WILLIAM P. LEAHY, JR.

I, Rear Admiral William P. Leahy, Jr., United States Coast Guard, submit the following declaration setting forth the United States Coast Guard's role in current operations off the coast of Haiti:

1. I am the Chief of the Office of Law Enforcement and Defense Operations for the United States Coast Guard. I have served in that capacity since June, 1991.

2. As the Chief, Office of Law Enforcement and Defense Operations, I am responsible for program oversight of Coast Guard surface and aviation operations, including current operations off the Haitian coast. I have personal knowledge of the facts stated below from information I have obtained from other Coast Guard personnel in the course of my duties.

3. The Coast Guard's involvement in Alien Migration Interdiction Operations began in 1981. In the first ten years of this program, the Coast Guard interdicted approximately 25,000 Haitian migrants. Originally, Haitian migrants were interdicted at sea and interviewed on board Coast Guard cutters by embarked Immigration and Naturalization Service personnel. Generally, those persons identified as economic migrants were immediately repatriated to Haiti, while those identified as raising plausible claims for political asylum were transported to the United States.

4. Since October, 1991, the Coast Guard has interdicted over 34,000 Haitian migrants. In November, 1991, in order to ease severe overcrowding on board Coast Guard cutters and reduce significant health and safety risks, the Coast Guard was permitted to begin off-loading interdicted migrants, including those who had not yet been interviewed by the Immigration and Naturalization

Service, at Naval Base Guantanamo. Ultimately, the Department of Defense established temporary facilities at Guantanamo with a capacity of 12,500 persons. This allowed the Coast Guard cutters, which had been forced to seek relief and shelter inport due to the overcrowding, to resume interdictions.

5. In May, 1992, the interdiction rates again swelled. From May 1 through May 20, 1992, 127 vessels carrying 10,497 Haitian migrants were interdicted by the Coast Guard. On May 19 alone, the Coast Guard interdicted 1,511 Haitian migrants. Attached to this declaration is a copy of the Coast Guard's May 29, 1992 statistical interdictions summary. This summary is cumulative from October 28, 1991.

6. At the same time, the temporary facilities at Guantanamo neared capacity. To preclude an emerging situation in which Coast Guard cutters might have become dangerously overloaded, on May 20, 1992, Real Admiral Kramek, Commander, Seventh Coast Guard District, the operational comander of units involved in alien interdictions, directed cutters on patrol to remove Haitian migrants from their vessels only when it appeared that a vessel was in imminent danger of foundering with resulting injury or loss of life.

7. From May 20 through May 23, 1992, Coast Guard units observed fifteen migrant vessels, but did not interdict those vessels. Although these vessels were evaluated as not in immediate danger, they were, by normal United States boating standards, unseaworthy, overloaded, and unfit for their intended voyage. For example, I received a report that a Haitian vessel departing Cuba overturned on May 17, 1992, resulting in the deaths of approximately half of the forty Haitian migrants onboard.

8. As may be seen in the attached statistical summary, the numbers of migrants interdicted by the Coast Guard has risen during the month of May. Based on this apparent trend, the lack of information suggesting that

the numbers of persons departing Haiti by sea would lessen at any time in the near future, and the impending lack of capacity at Naval Base Guantanamo, it was my professional opinion that Coast Guard resources available at the time of the May 20, 1992 policy change were insufficient to deal with this continuing crisis.

9. This posed a significant risk of loss of life. If available Coast Guard cutters had become so overloaded with migrants that they could not safely continue to interdict additional migrants, the Coast Guard would have been unable to respond even to vessels in immediate distress. This risk would have increased as the numbers of migrant departing Haiti in unseaworthy, ill-equipped boats increased.

10. On May 22, 1992, Commander, U.S. Atlantic Command, Norfolk, Virginia, issued a directive that Naval Base Guantanamo would not accept additional migrants because the temporary camps did not have the space, sanitation capacity, security resources, or housing and feeding capacity to safely accommodate more than 12,500 people.

11. On May 23, 1992, President Bush issued an Executive Order directing the Secretary of the Department in which the Coast Guard is operating to issue appropriate instructions to the Coast Guard to stop and board vessels believed to be violating United States immigration laws, or violating laws of a foreign country with which we have an arrangement, and return those vessels and passengers to the country from which they came. On May 24, 1992, after receiving appropriate instructions from the Secretary of Transportation, the Coast Guard issued guidance to the units involved concerning the implementation of the new Executive Order.

12. Under this guidance, which went into effect immediately, interdicted Haitians are being repatriated directly to Haiti. They are not being interviewed by the Immigration and Naturalization Service prior to repa-

triation. The only exceptions are if a commanding officer believes that repatriation would place an individual in immediate and exceptionally grave physical danger, based either on the commanding officer's observation of dangerous conditions at the time of repatriation or compelling statements from the individual. Commanding officers are directed to provide temporary refuge and immediately seek direction from higher authority if such a situation arises.

13. As indicated in the attached statistical summary, in the first five days after the new policy went into effect, the Coast Guard has interdicted 1,271 migrants. Of these, 339 had been repatriated as of May 29, 1992. An additional 704 migrants remain on Coast Guard cutters, awaiting repatriation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 29, 1992 in Washington, D.C.

/s/ William D. Leahy, Jr.
WILLIAM D. LEAHY, JR.
Rear Admiral, United States
Coast Guard
Chief, Office of Law
Enforcement and Defense
Operations

COAST GUARD HAITIAN MIGRATION INTERDICTION/REPATRIATION OPERATIONS DATE: 291000Z MAY 92
Page 1

CUTTER	LOCATION	O/B CGCs	PRU/SAT
THETIS (OTC)	ENR PAP	378	250/350
FORWARD	ENR GTMO	0	250/350
ESCANABA	OUTCHOP	0	250/350
CONFIDENCE	ENR PAP	185	250/350
COURAGEOUS	W/W	227	150/230
ALERT	ENR PAP	173	150/230
DECISIVE	W/W	0	150/230
MAUI	GTMO	0	080/120
PADRE	SAR	0	080/120
PEA ISLAND	W/W	0	080/120

TOTAL HAITIANS OFFLOADED GTMO
0

TOTAL HAITIANS O/B CUTTERS
963

HAITIAN OPS SUMMARY

HAITIANS INTERDICTED TOTAL	HAITIANS INTERDICTED DAILY
35367	282

VESSELS INTERDICTED TOTAL	VESSELS INTERDICTED DAILY
476	2

HAITIANS REPATRIATED TOTAL	HAITIANS REPATRIATED DAILY
16640	504

HAITIAN DISPOSITION SUMMARY

Onboard Cutters	963
GTMO:	
Unscreened	6625
Screened Out	2014
Screened In	2929
Other	0
Total GTMO -	11568
Repat to PAP-by USCG	16640
Political in US	7069
Other Countries	123
Rtnd PAP-via Oth Coun (as rptd by INS 15May)	287
Disposition Complete	24119

BEST AVAILABLE COPY

COAST GUARD HAITIAN INTERDICTION/REPATRIATION OPERATIONS DATE: 291000Z MAY 92

Page 2

OCT/NOV	INTERDICTS VSLS	INTERDICTS HAIT	DEC	INTRDICTS VSLS	INTRDICTS HAIT	HAIT O/B CGCs	JAN	INTRDICTS VSLS	INTRDICTS HAIT	HAIT O/B CGCs	FEB	INTRDICTS VSLS	INTRDICTS HAIT	HAIT RPAT	HAIT O/B CGCs
28-31	1	19	1	4	340	2248	1	0	0	176	1	1	24	0	1946
1-2	0	0	2	0	0	1092	2	0	0	0	2	0	0	0	1483
3	0	0	3	0	0	458	3	0	0	0	3	1	24	381	1023
4	1	47	4	1	50	156	4	0	0	0	4	0	0	0	1599
5	3	82	5	0	0	156	5	0	0	0	5	4	297	0	1599
6	1	36	6	5	199	355	6	0	0	0	6	0	0	508	853
7	0	0	7	0	0	179	7	0	0	0	7	0	0	0	206
8	4	85	8	0	0	179	8	0	0	0	8	0	0	200	357
9	1	175	9	1	32	32	9	0	0	0	9	1	13	0	1
10	3	46	10	5	232	105	10	1	189	0	10	1	31	510	523
11	0	0	11	3	218	264	11	0	0	189	11	0	0	0	44
12	1	32	12	1	184	666	12	0	0	189	12	0	0	507	513
13	2	164	13	2	22	666	13	1	15	15	13	1	79	251	257
14	2	353	14	2	129	22	14	0	0	15	14	2	92	508	587
15	2	164	15	1	139	139	15	1	12	0	15	0	0	0	171
16	7	372	16	3	156	274	16	1	43	41	16	1	34	0	598
17	2	173	17	0	0	430	17	0	0	41	17	2	125	527	196
18	6	444	18	0	0	430	18	0	0	0	18	0	0	0	713
19	7	628	19	0	0	452	19	3	247	247	19	1	77	516	655
20	1	26	20	0	0	0	20	5	219	381	20	0	0	510	510
21	1	47	21	0	0	0	21	2	79	219	21	0	0	510	0
22	4	439	22	0	0	0	22	5	281	298	22	0	0	0	0
23	7	383	23	0	0	0	23	16	1072	281	23	0	0	0	517
24	7	810	24	0	0	0	24	9	680	1093	24	0	0	517	0
25	6	433	25	1	87	87	25	0	0	1568	25	0	0	0	510
26	3	158	26	0	0	87	26	3	293	1023	26	1	72	510	583
27	2	78	27	2	366	453	27	30	1305	1745	27	1	355	511	938
28	8	592	28	1	14	467	28	20	1178	2478	28	0	0	511	. 0
29	2	23	29	0	0	379	29	3	286	2327	29	0	0	0	0
30	3	223	30	2	177	226	30	2	167	1986					
			31	0	0	318	31	4	587	1767	PRIOR 01 FEB			1132	
1-15	21	1203	1-15	25	1545		1-15	7	716		1-15	11	560	2865	
16-30	66	4829	16-31	9	800		16-31	103	6437		16-29	6	663	4112	
TOTAL	87	6032	TOTAL	34	2345		TOTAL	106	6653		TOTAL	17	1223	6977	

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COAST GUARD HAITIAN INTERDICTION/REPATRIATION OPERATIONS DATE: 291000Z MAY 92

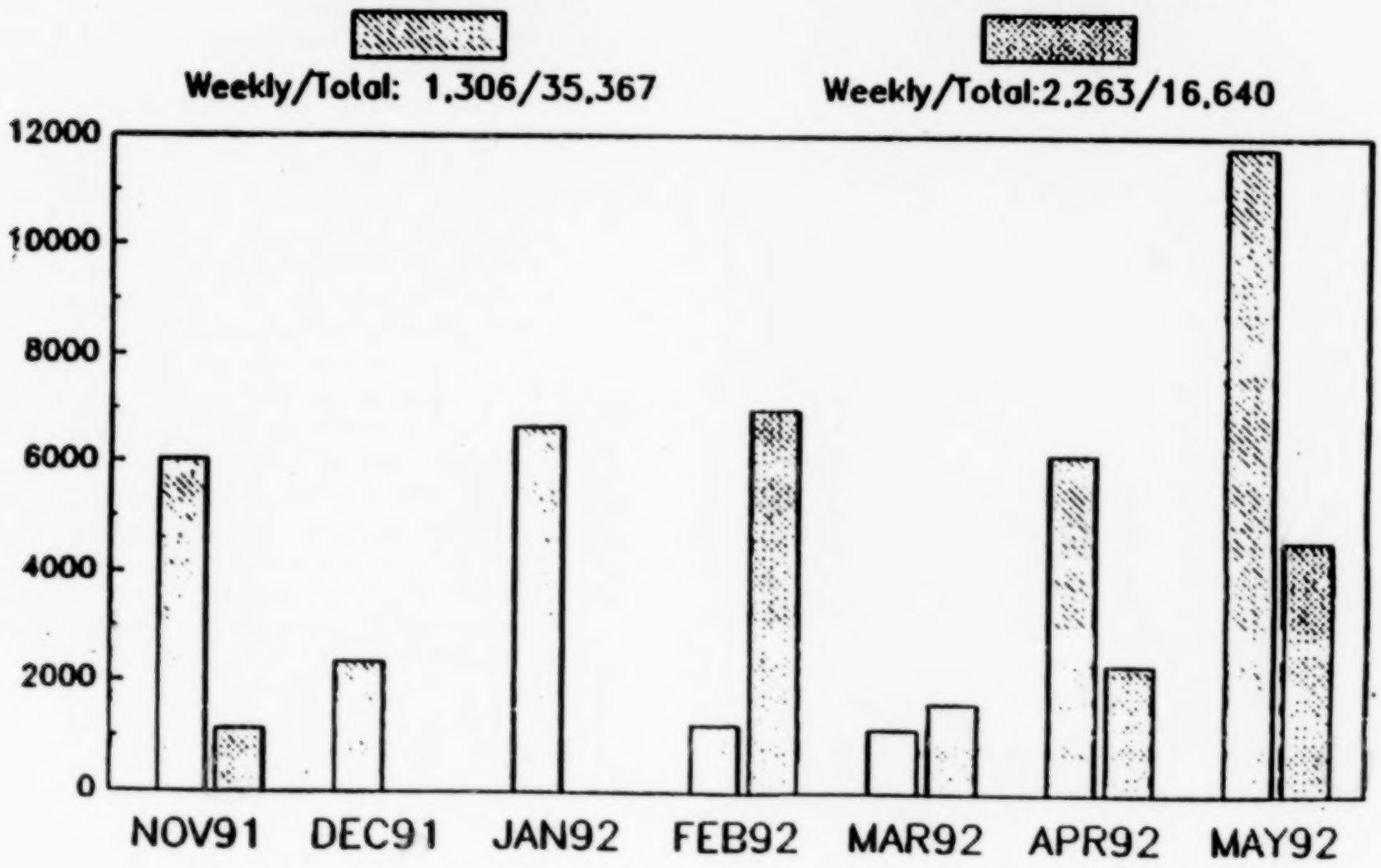
Page 3

MAR	INTERDICTS VSLS	HAIT	RPAT	HAIT O/B CGCs	APR	INTERDICTS VSLS	HAIT	RPAT	HAIT O/B CGCs	MAY	INTERDICTS VSLS	HAIT	RPAT	HAIT O/B CGCs
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2	0	0	0	0	2	2	242	0	1103	2	0	0	220	8
3	0	0	0	0	3	2	84	0	1182	3	1	247	0	494
4	0	0	0	0	4	1	28	197	335	4	9	682	247	929
5	0	0	0	0	5	1	18	0	242	5	7	593	0	1040
6	0	0	0	0	6	1	177	224	195	6	8	667	0	1273
7	0	0	0	0	7	3	350	0	596	7	7	181	244	637
8	0	0	0	512	8	2	62	245	253	8	3	178	102	178
9	1	55	512	55	9	3	206	0	412	9	4	272	0	272
10	1	134	0	659	10	2	273	206	505	10	6	245	0	486
11	0	0	525	0	11	2	134	0	134	11	10	755	251	428
12	1	22	0	22	12	2	34	0	168	12	4	521	0	767
13	0	0	299	22	13	8	568	0	994	13	12	999	246	1043
14	0	0	0	0	14	1	142	260	112	14	6	328	0	659
15	0	0	0	0	15	2	98	0	348	15	9	878	125	896
16	0	0	0	97	16	5	461	251	560	16	8	921	0	801
17	0	0	97	0	17	3	297	0	437	17	7	604	0	658
18	0	0	0	0	18	3	435	0	567	18	8	388	0	
19	0	0	0	0	19	3	184	0	452	19	14	1511	387	1853
20	0	0	0	0	20	2	248	0	775	20	4	527	252	1176
21	0	0	0	0	21	3	510	501	784	21	0	0	259	429
22	0	0	0	0	22	3	227	0	511	22	1	35	429	477
23	0	0	0	0	23	1	71	0	216	23	0	0	258	570
24	0	0	0	0	24	2	99	128	340	24	0	0	0	510
25	1	141	0	141	25	4	123	153	268	25	3	38	510	38
26	1	61	0	202	26	1	91	0	91	26	2	339	38	844
27	0	0	0	190	27	6	293	0	331	27	7	612	524	1129
28	1	28	126	71	28	7	553	55	756	28	2	282	504	963
29	2	231	0	302	29	0	0	96	192	29				
30	1	99	60	340	30	1	10	0	8	30				
31	2	387	0	727						31				
1-15	3	211	1336		1-15	35	2561	1132		1-15	86	6546	1439	
16-31	8	947	283		16-30	44	3602	1184		16-30	56	5257	3161	
TOTAL	11	1158	1619		TOTAL	79	6153	2316		TOTAL	142	11803	4596	
										CUM TOTAL	476	35367	16640	

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HAITIAN INTERDICTION OPERATIONS

As of 29 1000Z May 92



DEFENDANTS' EXHIBIT NO. 153

DECLARATION OF REAR ADMIRAL LLOYD E. ALLEN, JR.

I, Rear Admiral Lloyd E. Allen, Jr., United States Navy, being sworn, depose and state the following.

1. I am Deputy Director for Operations (Current Operations) for the Joint Staff of the Joint Chiefs of Staff. In that capacity, I have personal knowledge obtained from other Department of Defense personnel in the course of my duties regarding the camps at Guantanamo Bay, Cuba that have been set up to house temporarily Haitian migrants interdicted and rescued by the United States Coast Guard.

2. There are two camps housing Haitian migrants at the United States Naval Base at Guantanamo Bay, Cuba—Camp McCalla with 4 tent encampments and Camp Bulkeley with one. Our evaluation of current conditions is that both camps combined have a total capacity of 12,500 people. This total includes placing 1,000 people within the confines of an aircraft hangar, a facility suitable for shelter for only a very short time. Additionally, use as a shelter removes this facility from its current use as a processing center for incoming/outgoing Haitians. As of 28 May, there were 11,568 Haitian migrants resident at Guantanamo with an additional number of migrants presently embarked aboard Coast Guard cutters. If additional migrants leaving Haiti were taken to Guantanamo Bay, the capacity of Guantanamo Bay Naval Station will be reached within the next 48 hours.

3. Guantanamo lacks the infrastructure necessary to support additional migrants beyond the 12,500. Beyond the lack of shelter, the base is unable to dispose of the waste associated with a population in excess of the limit established by the Joint Task Force Commander and

USCINCLANT. Water supplies to the camps are carried in pipes above ground which, because of Guantanamo's tropical location, results in high ambient water temperature. As the temperatures continue to rise, the demands for water will increase, while the sanitation and general living conditions will become intolerable. Finally, current camp levels already fully tax the Guantanamo electrical system. All available flat land is in use. The ony sites available for immediate expansion are Morale Welfare and Recreation areas (ball fields, school playground). Conversion of these sites to camp use with the attendant overload of naval base infrastructure would require imposition of water rationing and probable evacuation of military dependents from Guantanamo. The approaching summer season with its hurricanes and tropical storms is an additional cause of concern. Comprehensive hurricane shelter plans have been developed and the maximum capacity for emergency migrant hurricane shelter protection is 8,300.

4. The impacts on DoD's ability to perform its other missions within the USCINCLANT area of responsibility have been significant. In addition to extensive sealift requirements, numerous C-5, C-141, and C-130 flights have been required to supply the camps. Joint Task Force Guantanamo includes over 2,000 soldiers, sailors, airmen, and marines. Critical civil affairs and psychological operations assets from the Reserve community have been solicited and have volunteered to serve as they did in Just Cause and during DESERT SHIELD/STORM. This has proven to be a strain on them and their families, but as important, has severely depleted a low density resource within DoD. Military Police assets from installations within the United States have been deployed, depriving their home bases of needed services. This is in addition to deployment of Marine Corps personnel that responded to disruptions in one of the camps. As a result of the Haitian population and the attendant logistical

support, Naval Station Guantanamo can no longer provide support to units deployed for exercises within the region.

5. The Department of Defense has no alternative locations to augment Guantanamo within reasonable steaming distances of Haiti which could be utilized as temporary facilities for the migrants.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Lloyd E. Allyn
29 May 1992

DEFENDANTS' EXHIBIT NO. 154

DECLARATION OF ARNOLD L. KANTER

1. I, Arnold L. Kanter, am the Under Secretary of State for Political Affairs, a position I have held since October 1991. Organizationally, the Under Secretary of State for Political Affairs is the third ranking position within the Department of State, immediately following the Secretary of State and the Deputy Secretary of State. In that capacity, I participate in the formulation and execution of United States foreign policy. I advise both the Secretary and the Deputy Secretary of State concerning specific and general foreign policy issues, including matters within the Inter-American region. These responsibilities require close coordination at the highest levels with a number of other departments and agencies within the United States Government.

2. I have been actively involved in the formulation and implementation of U.S. foreign policy responses to the coup d'etat that took place in Haiti on September 30, 1991, in which the duly elected president of Haiti, Jean Bertrand Aristide, was overthrown. Since that time, I have provided ongoing policy guidance with respect to U.S. international efforts both to restore constitutional rule in Haiti and to stem the outflow of Haitian boat migrants to the United States. The following information is based upon either personal knowledge of information provided to me by Department personnel, including personnel of the Bureau for Refugee Programs and the Bureau of Inter-American Affairs, in the course of their official duties.

3. During the past several weeks, the underlying political crisis in Haiti has continued unabated, and efforts to find a constitutional and durable solution have not yet been successful. The adverse effects for U.S. foreign policy of the issuance of a restraining order by the District Court cannot be overstated.

4. The boat migrant problem severely compounds and complicates the underlying political crisis afflicting Haiti, which is the principal focus of U.S. foreign policy towards that country. A temporary restraining order would undermine the U.S. Government's flexibility in dealing with this international crisis and would make the U.S. government particularly vulnerable to pressure tactics from the de facto authorities in Haiti, who would use a massive outmigration of Haitian citizens to put the U.S. under pressure to abandon the embargo and other measures designed to speed the return of democracy. I believe that the de facto authorities in Haiti would be encouraged in this course by a restraining order arising from the current litigation.

5. Moreover, interference with repatriation of Haitian interdictees would complicate U.S. bilateral relations with neighboring countries such as the Bahamas, the Dominican Republic, Honduras, Jamaica and Venezuela. In response to the outflow of Haitian migrants, several of these countries have been providing temporary shelter to populations of Haitian boat interdictees, in part as a result of U.S. diplomatic initiatives. These countries are also anxious to repatriate the Haitian interdictees they are sheltering. However, as the number of new Haitian interdictees picked up by the U.S. Coast Guard has continued to swell and the capacity to accommodate them at Guantanamo or on Coast Guard cutters has reached its limit, the United States has been compelled yet again to launch diplomatic efforts vis-a-vis these and other countries to persuade them to accept even larger numbers of Haitians for temporary safehaven. Experience has proven that the prospects of success for such diplomatic initiatives are quite low and may negatively affect U.S. relations with states in the region. Just last week, a private U.S. request to the Dominican Republic to consider establishing a UNHCR camp on its territory became a central issue in public debate in the Dominican

Republic and a source of intense criticism of the United States, thus complicating U.S.-Dominican relations.

6. The effects of a temporary restraining order or injunction would also materially complicate U.S.-Cuban relations. This is due in part to the protracted presence of large numbers of Haitians at the U.S. facility at Guantanamo Bay, Cuba. If the number of migrants interdicted on the high seas by U.S. Coast Guard cutters remains at the levels experienced in recent weeks—which I have every reason to believe would be the case—and if the United States Government were restrained from repatriating them directly to Haiti, the facility at Guantanamo would be pressed beyond its capacity. Such a situation could at any moment offer the Castro regime an opportunity to engage in a provocative action that could place a severe strain on: (i) already tense bilateral diplomatic relations, setting back U.S. efforts to resolve important bilateral issues such as Cuban migration; (ii) the migration processing operation for Haitian interdictees at Guantanamo; and (iii) the security of our facility at Guantanamo.

7. In sum, U.S. foreign relations interests would be undermined by an order preventing the direct repatriation of Haitian interdictees. Bearing in mind the ultimate objective of U.S. foreign policy toward Haiti, i.e., to promote the establishment of a democratic, constitutional and stable government in that country as expeditiously as possible, it is my considered view that U.S. foreign relations interests cannot be subordinated to an injunction doing severe injury to the interests of the United States.

8. In light of the saturation of Guantanamo and the Coast Guard cutters, the lack of a third country option of the necessary magnitude, the continuing massive outflow, and the attendant risks of loss of life, the U.S. Government faced a difficult policy decision: whether to bring all fleeing Haitians to the U.S. for asylum proc-

essing or whether to return them directly to Haiti upon interdiction. Due to the judgment that bringing all Haitians to the U.S. would precipitate an outflow of a magnitude as yet unknown, and the even greater prospect of loss of significant numbers of lives, the decision was made to return interdictees directly to Haiti.

9. Haitians who fear persecution will have the opportunity to have their claims to refugee status heard by U.S. Embassy officers, without risk to their lives by putting to sea, due to the existence of the unique opportunity (currently implemented in only three other countries in the world) to present an in-country request for admission to the U.S. as a refugee at the U.S. Embassy in Port-au-Prince. Consistent with the President's directive, the State Department is prepared to reorganize or increase the Embassy staff to accommodate additional requests, if necessary. In addition, Embassy personnel will be travelling outside Port-au-Prince to assist applicants in other parts of the country in pursuing their claims.

10. Persons who wish to apply for refugee status in Haiti may come in person or obtain information by mail or telephone at the Consular Section of the Embassy in Port au Prince. The Embassy is making information about the application process available to the general public and to persons repatriated by the Coast Guard. The Embassy has reported that members of President Aristide's staff have already come to the Consular Section for refugee processing without evidence of surveillance by the authorities and without subsequent difficulties.

11. There are adequate refugee admissions numbers available to support the admission into the U.S. of approved Haitian refugees. There are 3000 refugee admissions numbers allocated to the Latin American and Caribbean region for fiscal year 1992, ending September 30, 1992. In addition to the regional ceiling, there is a reserve of 1000 admissions numbers which have not been allocated to any region, and which to date have not been

used. In the event that it is necessary, these numbers could be made available for Haitian refugee admissions. It is also possible that unused admissions numbers from other regions could be reallocated for Haitians, if necessary. Finally, in the unlikely event that the number of approved Haitian refugees exceeds all of these combined sources of admissions numbers, the refugee admissions statute provides the authority for the President to determine that an unforeseen emergency exists and consult with the Congress for the purpose of fixing an additional number of refugees that may be admitted in response to such emergency.

12. The Department of State has instructed the Embassy in Port-au-Prince to devote personnel and other resources to monitoring the post-repatriation treatment of returnees. This monitoring effort is two-fold: first, Embassy officials have been directed to make spot checks around the country on the well-being of randomly selected returnees; second, Embassy officials have been directed to continue to make first-hand investigations when specific allegations of mistreatment are conveyed to the INS, the Embassy, the Department of State, or other credible sources.

13. In addition to the Embassy's own monitoring efforts, the Embassy also has access to a network of contacts in Haiti that permits it to evaluate possible violations of human rights in Haiti. These contacts include key political figures at all levels and across the political spectrum, business persons, the clergy, educators, the media, health care workers, and human rights activists. The Embassy also maintains contact with the international community, including private voluntary organizations working throughout the country in such areas as agriculture, health care and education; missionary and other religious groups; and representatives of international organizations.

14. Since repatriations resumed on January 31, 1992, Embassy staff have talked to more than 2,000 returnees, or their relatives, friends and neighbors. Based on the information gathered through these personal inquiries, the Department has no reason to believe that returnees have been subjected to harm as a result of their departure from Haiti or their subsequent return.

15. In addition, the Embassy has been asked to attempt to substantiate the specific claims of a limited number of Haitian interdictees, either as part of the screening process or in response to specific allegations of harm to a returnee. In these instances, the Embassy either has not been able to verify the validity of the allegations, or, in some instances, has found directly contradictory information.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Arnold L. Kanter

Executed in Washington, D.C.
May 29, 1992

No. 91-1292

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

HAITIAN REFUGEE CENTER, ET AL., PETITIONERS

v.

JAMES BAKER, III, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
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QUESTIONS PRESENTED

This case involves a challenge to an interdiction program established by the President. Under that program, Haitian aliens seeking illegal entry into the United States are interdicted on the high seas and repatriated to Haiti, unless they establish a credible claim to refugee status. The questions presented are:

1. Whether Article 33.1 of the United Nations Convention on the Status of Refugees affords the petitioner Haitian migrants any enforceable rights in United States courts with respect to the operation of the interdiction program outside the territory of the United States.

2. Whether any judicially enforceable rights are conferred on the Haitian migrants by the Executive Order establishing the interdiction program, internal operating guidelines issued by the Immigration and Naturalization Service, or Sections 208(a) and 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1158(a) and 1253(h).

3. Whether the petitioner Haitian migrants have a cause of action to challenge the interdiction program under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

4. Whether injunctive relief barring repatriation of Haitian migrants is in any event barred by equitable principles.

5. Whether petitioner Haitian Refugee Center has a right under the First Amendment to have its representatives board Coast Guard cutters on the high seas and enter the United States Naval Base at Guantanamo Bay, Cuba, to speak with and advise interdictees who are held in custody.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. 91-1292

HAITIAN REFUGEE CENTER, ET AL., PETITIONERS

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JAMES BAKER, III, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT

1. This case arises out of the President's exercise of his constitutional and statutory authority to establish a program for interdicting aliens on the high seas. See 8 U.S.C. 1182(f), 1185(a). That program, begun in 1981, stems from a Presidential determination that uncontrolled illegal immigration by sea is a "serious national problem." Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981). Accordingly, the President, by Executive Order, directed the Coast Guard to intercept vessels suspected of transporting illegal immigrants and to return all of the passengers to their country of origin, subject to the proviso

that any "person who is a refugee" is not to be repatriated without his consent. Exec. Order No. 12,324, § 2(c)(3) (Pet. Exh. 1-2).[1] Contemporaneously, the United States entered into a bilateral agreement with Haiti, under which U.S. officials are permitted to interdict and board Haitian flag vessels suspected of carrying illegal immigrants. Agreement Effected by Exchange of Notes, Sept. 23, 1981, United States-Republic of Haiti, 19 U.S.T. 8223, T.I.A.S. No. 10,241 (Pet. Exh. 4-6).

The interdiction program has been a very effective tool in the enforcement of our immigration laws. It has also saved countless lives. Most vessels interdicted have been "grossly overloaded, unseaworthy, lacking basic safety equipment, and operated by inexperienced sailors." 11/20/91 Decl. of Rear Admiral Leahy ¶ 4 (Gov't Stay App. B, Exh. 3). Many of these vessels could not have completed the 500-mile voyage to the United States. Between 1981 and 1991, more than 25,000 would-be migrants were interdicted. *Ibid.* A State Department study of migration patterns from Haiti over that period "indicates that increased outflows tend to coincide with periods of economic difficulty rather than any particular political factor." 12-1-91 Decl. of Robert S. Gelbard ¶ 3 (Gov't Stay App. C, Exh. 10). Thus, although the present crisis began with a military coup in Haiti on September 30, 1991, the virtual exodus of illegal immigrants from Haiti began approximately one month later, when economic sanctions were imposed. 11/20/91 Leahy Decl. ¶ 5; Gelbard Decl. ¶ 3. More than 15,000 Haitian migrants have been interdicted by the Coast Guard since October 28, 1991.

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[1] As used herein, "Pet. Exh." refers to the exhibits included in the bound certiorari petition; "Pet. App." refers to the six volumes of appendices filed by petitioners; and "Gov't Stay App." refers to the appendices to the Application for a Stay Pending Appeal we filed in this Court on January 30, 1992.

Under Section 3 of the Executive Order, the Attorney General is responsible for determining whether any of the aliens taken into Coast Guard custody are "refugees" —persons who have a well-founded fear of persecution on account of their political opinion (see 8 U.S.C. 1101 (a)(42)(A); *INS v. Elias-Zacarias*, No. 90-1342 (Jan. 22, 1992), slip op. 4)—who should not be repatriated. To implement this directive, the Immigration and Naturalization Service (INS) developed screening procedures, which are set forth in internal "guidelines" (Pet. Exh. 7-9) and further described in declarations filed below. 11/20/91 Decl. of Leon Jennings (Gov't Stay App. B, Exh. 5); 12/10/91 Decl. of Gregg A Beyer ¶¶ 3-4, 8-15 (Gov't Stay App. G).

Under the procedures, an INS official first interviews the interdicted aliens on board the Coast Guard cutter to identify any aliens who make a credible showing of refugee status. The INS guidelines create an informal, non-adversarial process to permit expeditious identification of potential refugees so that the Coast Guard can immediately return other interdicted aliens to their country of origin. Under current practice, any aliens who satisfy the threshold standard are to be brought to the United States so that they can file an application for asylum under Section 208(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1158(a). These "screened in" individuals then have the opportunity for a full adjudicatory determination of whether they satisfy the statutory standard of being a "refugee" and otheriwse qualify for the discretionary relief of asylum. Any aliens who are initially "screened in" but ultimately not granted asylum are then to be returned to their country of origin, consistent with procedures afforded under the INA.

2. On November 19, 1991, immediately following the resumption of repatriations (which the Executive Branch had temporarily suspended in the wake of the coup in Haiti), petitioner Haitian Refugee Center (HRC) filed

this action for injunctive relief against officials of the Department of State, the Coast Guard, and INS. Although the D.C. Circuit had previously held that HRC (a private, non-profit corporation in the United States) did not have standing to bring many of the same claims affecting Haitians interdicted on the high seas,[2] the district court, within a few hours, granted HRC's application for a temporary restraining order (TRO) barring repatriations. Because the United States was unable to appeal the TRO, it was compelled fundamentally to alter the interdiction program. Although the Coast Guard continued to interdict the Haitian migrants, they could not be returned to Haiti or kept indefinitely on the decks of Coast Guard cutters; the interdictees therefore were transported to the U.S. Naval Base at Guantanamo Bay, Cuba, where they could be temporarily housed in shelters under the custody of the Department of Defense and INS. In the interests of continuity and uniformity, however, INS continued to conduct the initial screening interviews at Guantanamo pursuant to the informal, non-adversarial procedures utilized aboard Coast Guard cutters. While the TRO was in effect, the district court also ordered discovery that permitted representatives of HRC to have access to individual Haitians at Guantanamo. Pet. App. 41, 63. HRC then filed an amended complaint, in which it named some individual Haitians, to whom it obtained access only through discovery as plaintiffs and as representatives of a class. Pet. App. 62; Gov't Stay App. F.

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[2] *HRC* v. *Gracey*, 809 F.2d 794 (D.C. Cir. 1987). In a separate opinion, Judge Edwards rejected HRC's claims on the merits, concluding that the interdiction program violated no rights of the Haitians under the INA, the Constitution, or Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. 809 F.2d at 837-841. The United States acceded in 1968 to the U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, which bound parties to adhere to Articles 2-34 of the Convention.

3. On December 3, 1991, the district court entered a preliminary injunction against repatriation based on two of petitioners' numerous claims—those arising under Article 33 of the U.N. Convention and the First Amendment. Pet. App. 42.[3] The government took an immediate appeal, and on December 17, 1991, the court of appeals dissolved the preliminary injunction. Pet. App. 43. The court instructed the district court to dismiss the claims under Article 33, holding that it is not self-executing and thus provides no enforceable rights to the Haitian plaintiffs. *Id.* at 3. It also held that HRC's claim of a First Amendment right of access to the interdictees could not support the district court's order barring repatriation of the interdictees, since that relief did not redress any right asserted by HRC. Id. at 3-4.[4] Judge Hatchett dissented.

4. On the evening of the day the court of appeals ruled, the district court granted another "temporary" order against repatriation of the Haitian interdictees, this time based on the same APA claims that it had rejected just fifteen days earlier. Pet. App. 44. On December 19, 1991, the court of appeals, again over Judge Hatchett's dissent, granted the government's motion for an emergency stay of that order. Pet. App. 45. On the following day, however, the district court entered yet another injunction against repatriation, this time based on HRC's asserted constitutional right of "access" to Guantanamo to confer with interdictees. Pet. App. 46. Despite the government's immediate appeal of that order and request for an immediate stay, the court of appeals allowed the injunction to stand pending expedited briefing

[3] The district court found, however, that petitioners had not shown a probability of success on their remaining claims under the Fifth Amendment, INA, Executive Order, INS guidelines, and Administrative Procedure Act (APA). Pet. App. 42, at 52-55.

[4] Petitioners' suggestion of rehearing *en banc* with respect to the Article 33 ruling was rejected on January 28, 1992, with no judge having requested a formal poll of the court. Pet. App. 51.

and argument. In late January, when the tide of Haitian emigration increased significantly and threatened disruption of the Nation's foreign policy interests and military operations on the high seas and at Guantanamo, the government renewed its motion for a stay. After the court of appeals failed to respond, the government sought a stay of the injunction from this Court. The Court granted a stay on January 31, 1992, and the court of appeals granted a stay as well. Pet. Stay Applic. 19-21.

5. On February 4, 1992, the court of appeals rendered a thorough decision rejecting all of petitioners' remaining claims and ordering dismissal of the complaint for failure to state a claim on which relief can be granted. Pet. App. 56. The court first held that petitioners have no right to judicial review under the APA, relying on the exceptions where "statutes preclude judicial review" or where "agency action is committed to agency discretion by law." *Id.* at 14-24; see 5 U.S.C. 701(a)(1) and (2). With respect to the former, the court recognized that it must "look not only at the express language of the statute but the statutory scheme as a whole." Pet. App. 56, at 15 (citing *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 345 (1984)). It noted that the relevant substantive and judicial review provisions of the INA apply only to aliens within the United States (8 U.S.C. 1105a, 1158, 1253), and that judicial review is unavailable for persons, such as the Haitian aliens here, who are outside the United States. On this basis, the court held that "review under the APA is foreclosed because the relevant provisions of the INA provide the sole and exclusive avenue for judicial review." Pet. App. 56, at 16. In its view, this conclusion was further supported by case law holding that aliens outside the United States have no right to review of immigration determinations. *Id.* at 16-19.

In finding that the actions petitioners challenge are also "committed to agency discretion by law," the court

acknowledged the narrowness of that exception but noted the breadth of the discretion afforded the President by 18 U.S.C. 1182(f) and the absence of any statutory limits on interdiction and repatriation activities and procedures. Pet. App. 56, at 20-21. It further held that, even assuming that other possible sources of law (*e.g.*, the Executive Order, INS guidelines, or the Convention) could form the basis of an APA action, none provided meaningful standards for review of the issues in this case—*i.e.*, the manner in which INS is to conduct refugee screening in the high seas interdiction program. *Id.* at 21-23.

The court of appeals next addressed various theories advanced by the Haitian petitioners that even the district court had rejected. Thus, it held that the INA, as amended by the Refugee Act of 1980, affords no independent basis for relief. Pet. App. 56, at 25-27. The court reasoned that 8 U.S.C. 1253(h), like the entirety of the Section in which it appears, applies only to aliens "in the United States." Pet. App. 56, at 26 (quoting 8 U.S.C. 1253(a)). The court also noted that the asylum provision, 8 U.S.C. 1158, applies only to aliens "physically present in the United States or at a land border or port of entry," and it rejected petitioners' argument that the high seas become the "functional equivalent" of a port of entry whenever the United States conducts interdiction operations. Pet. App. 56, at 26-27. The court of appeals likewise rejected petitioners' argument that either the Executive Order or the INS guidelines could themselves—independently of the APA—create a private cause of action. *Id.* at 28-30. In its view, the terms and purposes of the Executive Order—which specifically contemplates "a procedure taking place entirely on the high seas"—could not have been intended to confer a right of judicial review. *Id.* at 28. The court also ruled that the INS guidelines were intended simply to provide internal instructions to INS employees, and lack the "force and

effect of law" necessary for judicially enforceable rights. *Id.* at 28-30.

Finally, the court rejected petitioner HRC's claim that it has a First Amendment "right of access" to Haitian interdictees on board Coast Guard cutters or at Guantanamo. Pet. App. 56, at 30-38. It first concluded that the precedents upon which HRC and the district court chiefly relied—*NAACP* v. *Button*, 371 U.S. 415 (1963), and *In re Primus*, 436 U.S. 412 (1978)—do not support a broad right of access to persons in government custody, but rather "recognize a narrow First Amendment right to associate for the purpose of engaging in litigation as a form of political expression." Pet. App. 56, at 34. Because such a right of association is "predicated upon the existence of an underlying legal claim that may be asserted by the potential litigant," the court believed it "nonsensical" to find such a right here, since the interdicted Haitians have no enforceable rights under the Constitution or laws of the United States. *Ibid.*

Finally, the court of appeals held that even if HRC had a right to associate with interdicted Haitians, the First Amendment does not impose upon the federal government an affirmative obligation to assist it in exercising that "right" by affording access to aliens in custody aboard Coast Guard ships on the high seas or at a military base in a foreign country. Pet. App. 56, at 34-37. The court recognized that affording such access to HRC would impose substantial burdens on the United States, *id.* at 36-37, and emphasized that the only other appellate decision directly on point had squarely rejected the notion that the government must assist citizens wishing to communicate with aliens who are in custody awaiting administrative proceedings. *Id.* at 37-38 (discussing *Ukrainian-American Bar Ass'n* v. *Baker*, 893 F.2d 1374 (D.C. Cir. 1990)).[5]

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[5] Judge Hatchett dissented. He agreed with the majority that HRC has no constitutional right of access to Coast Guard ships

ARGUMENT

The court of appeals properly rejected petitioners' unprecedented assault upon the prerogatives and duties of the Executive Branch to carry out the Nation's foreign relations, direct military operations abroad, and control illegal immigration. For more than two months, a series of district court injunctions stymied the efforts of the Executive Branch to implement its longstanding policy of interdicting and promptly repatriating Haitian migrants attempting to enter this country illegally. These judicial intrusions into matters committed to the Executive Branch were utterly without basis in the Constitution and laws of the United States, and the court of appeals' holding that petitioners' complaint must be dismissed for failure to state a claim is fully consistent with the decisions of this Court and other courts of appeals. Indeed, with respect to the central legal issues, three other courts of appeals—like the court below—have held that Article 33 of the Refugee Convention is not self-executing (see pages 13-14, *infra*), and the only other court of appeals to have considered the First Amendment claim HRC raises—the D.C. Circuit in *Ukrainian-American*—has likewise rejected it. Accordingly, the legal issues petitioners raise plainly do not warrant review by this Court.

In addition, the district court's sweeping injunctions barring repatriations were wholly improper on equitable grounds. The injunctions fundamentally defeated the purposes of the interdiction program, required the United States to establish camps for Haitian migrants at Guantanamo Naval Base, necessitated the substantial diversion of resources from other military and law enforce-

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on the high seas, but believed that HRC has a right of access to aliens in custody at Guantanamo. Pet. App. 56, at 4-9 dissenting opinion). Judge Hatchett also disagreed with the majority's APA analysis. *Id.* at 10-25. He did not address petitioners' remaining claims. *Id.* at 1 n.1.

ment tasks, and interfered with the conduct of the Nation's foreign relations regarding Haiti and Cuba. Separation of powers principles commit such matters to the political Branches, and preclude the judiciary from granting the extraordinary equitable relief of an injunction having such adverse effects.

This Court's stay of January 31—and the court of appeals' own stays and rulings rejecting petitioners' claims on the merits—have now freed the responsible Executive Departments to carry out the interdiction program and conduct the Nation's foreign policy and military operations at Guantanamo and on the high seas without the direct judicial interference under which they labored for more than two months. But the United States remains committed to restoring democratic rule in Haiti, ensuring that interdictees who truly are refugees under established legal standards are not returned to Haiti without their consent, holding the de facto authorities in Haiti to that country's commitment not to prosecute or persecute individuals because of their departure, and monitoring the repatriation process and related events in Haiti to guard against any persecution of the returnees and others. Since the stays were entered by this Court and the court of appeals on January 31, the repatriation of interdictees who were found not to have a colorable claim of refugee status has proceeded on a regular basis, without incident and without credible reports of retaliation against the returnees.

This case was launched by an ill-considered TRO barring repatriations that was issued at the behest of an organization (HRC) that had no standing to seek that relief; it has since taken on a life and regime of its own and has, regrettably, driven significant aspects of the Nation's immigration, military and foreign policy. We now respectfully request the Court to bring the litigation to a definitive close by an immediate denial of certiorari. That disposition would remove the shadow that the case

continues to cast over the Nation's policies concerning Haiti and the Executive's conduct of its constitutionally assigned responsibilities.

A. 1. Petitioners first contend (Pet. 17, 25-26) that the repatriation of Haitian interdictees violates Article 33.1 of the U.N. Convention. That contention is without merit for a number of reasons.

a. In the first place, Article 33.1 is simply inapplicable in this case. The text of the Article, its negotiating history, and its implementation by the United States all support the official interpretation by the Department of State—which is entitled to great weight, *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982)—that Article 33.1 applies only to refugees within the territory of the contracting State.

Article 33.1 provides that a contracting State shall not "expel or return ('refouler') a refugee" to the frontiers or territories where his life or freedom would be threatened for political reasons. Pet. Exh. 3. Although petitioners avoid any discussion of the geographic scope of Article 33.1 in their certiorari petition, they invoke (Pet. 17, 25) Article 33.1 to challenge their "return" to Haiti. Petitioners fail to appreciate, however, that the term "return" in Article 33.1 is expressly defined by the parenthetical insertion of the French word "refouler." As relevant to this case, *Cassell's French Dictionary* 627 (1978), defines "refouler" to mean "expel (aliens)"—a definition that obviously encompasses only aliens physically present in the territory of the contracting State. This construction is confirmed by paragraph 2 of Article 33, which provides that the benefit of non-refoulement may not be claimed by a refugee who is a danger to the security of "the country in which he is." Pet. Exh. 3.

The negotiating history also bears out this interpretation. The delegates to the drafting Conference placed in the record the Conference's understanding that the word "expel" in Article 33.1 refers to a "refugee already

admitted into a country," while the term "return ('refouler')" refers to a "refugee already within the territory but not yet resident." The delegates also placed in the record their understanding that the "possibility of mass migrations across frontiers or of attempted mass migrations"—the precise context in which this case arises—"was not covered by article 33." This history was quoted and relied upon by Judge Edwards in his concurring opinion in *HRC* v. *Gracey*, 809 F.2d 794, 840 n.133 (D.C. Cir. 1987), in which he concluded that Article 33.1 does not apply to the Haitian interdiction program.[6]

Finally, the Protocol incorporating Article 33 was ratified by the United States on the understanding that

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[6] These and other portions of the negotiating history that confirm the State Department's interpretation—as well as the Department's official position in diplomatic undertakings and other forums since that time—are discussed in the government's opening brief (at 16-20 & Addendum B) and reply brief (at 4-7) on the first appeal below, No. 91-6060.

Although petitioners do not address the extraterritoriality issue in the petition, they do include some discussion of the point in Appendix B to their Application for a Stay (at B17-B20). However, they fail to acknowledge the text of Article 33 that cuts against their position. Petitioners do contend (at B17-B-18) that any reliance on the negotiating history is misplaced, ignoring that this Court has made clear that such reliance is appropriate where the meaning of the treaty text is not "obvious." *See United States* v. *Stuart*, 489 U.S. 353, 365-366 (1989); *id.* at 374 (Scalia, J., concurring); *Air France* v. *Saks*, 470 U.S. 392, 400 (1985). Ironically, petitioners then proceed to rely (Stay Applic. App. B18-B19) on statements made by Louis Henkin at a meeting in 1950. However, as explained in the government's reply brief (at 6 n.8) on the first appeal below, Professor Henkin's remarks were made more than a year before the two sessions at which Article 33 was finalized, and they reacted to a different proposal. Moreover, Professor Henkin was not the United States representative at the Conference of Plenipotentiaries (where the definitive negotiating history discussed above occurred and the word "refouler" was inserted); his views were not expressed at the final sessions, and they were not adopted by the Conference.

it conformed to the corresponding provisions of the INA [7]; by that time, this Court had already held, in *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958), that under 8 U.S.C. 1253(h) (1958), even aliens who were physically present in the United States, but not lawfully admitted, were ineligible for withholding of deportation. See *INS* v. *Stevic*, 467 U.S. 407, 415, 417-418 (1984). A fortiori, the interdictee petitioners in this case, who are altogether outside the United States (in Cuba or on the high seas), have no rights under Article 33.1.[8] Petitioners cite no judicial ruling to the contrary. Their reliance on Article 33.1 therefore may be dismissed on this ground alone.

b. The court of appeals found it unnecessary to decide whether Article 33.1 could be judicially extended to the

[7] See S. Exec. Doc. K, 90th Cong., 2d Sess. III (1968) (message from Pres. Johnson) ("Accession to the Protocol would not impinge adversely upon established practices under existing laws in the United States."); *id.* at VII, VIII (report of Secretary of State Rusk) (same); S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 4 (1968) ("refugees in the United States have long enjoyed the protection and the rights which the protocol calls for"); 114 Cong. Rec. 29,391 (1968) (Sen. Mansfield).

[8] Commentators likewise have concluded that Article 33.1 does not apply outside of a contracting party's territory. 2 A. Grahl-Madsen, *The Status of Refugees in International Law* 94 (1972); N. Robinson, *Convention Relating to the Status of Refugees: A Commentary*, at 162-163 (1953); Hailbronner, *Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?*, 26 Va. J. Int'l L. 857, 861-862 (1986); Weis, *The United Nations Declaration on Territorial Asylum*, 7 Can. Y. Int'l L. 92, 123-124 (1969). Petitioners cite (Pet. 3, 28) the direction to the Attorney General in Section 3 of the Executive Order to ensure "strict observance" of existing "international obligations." However, Section 3 does not purport to identify specific sources of law (compare §§ 2(b)(1) and (2) (referring to the Convention on the High Seas)) or to expand any existing international obligations of the United States. The Executive Order therefore does not assist petiitoners in seeking a judicial extension of Article 33.1 beyond the territory of the United States.

high seas or foreign soil, because it held that, in any event, "Article 33 is not self-executing and thus provides no enforceable rights to the Haitian plaintiffs in this case." Pet. App. 43, at 3. That ruling (which the en banc court, without dissent, declined to disturb) is correct and is in agreement with the decisions of the other courts that have addressed the issue. See *Bertrand* v. *Sava*, 684 F.2d 204, 218-219 (2d Cir. 1982) ("the Protocol's provisions were not themselves a source of rights under our law unless and until Congress implemented them by appropriate legislation"), *Pierre* v. *United States*, 547 F.2d 1281, 1288 (5th Cir.) ("no new rights or entitlements were vested * * * by operation of the Protocol"), vacated on other grounds, 434 U.S. 962 (1977); *United States* v. *Aguilar*, 883 F.2d 662, 680 (9th Cir. 1989) ("Neither the Handbook nor the Protocol have the force of law * * *. The Protocol was not intended to be self-executing."), cert. denied, 111 S. Ct. 751 (1991); *HRC* v. *Gracey*, 600 F. Supp. 1396, 1401, 1406 (D.D.C. 1985), aff'd on other grounds, 809 F.2d 794 (D.C. Cir. 1987).[9]

[9] In Appendix B to their Stay Application (at B13), but not in the certiorari petition, petitioners assert a conflict with the Fifth Circuit's decision in *Nicosia* v. *Wall*, 442 F.2d 1005 (1971). However, *Nicosia* did not discuss the self-execution issue; it simply assumed that Article 33.1 could be raised as a defense in an extradition proceeding. 442 F.2d at 1006. Moreover, the Fifth Circuit subsequently held in *Pierre*, cited in the text, that Article 33.1 is *not* self-executing. There accordingly is no circuit conflict on the issue.

Petitioners also cite (Stay Applic. App. B15) the description of the Protocol as "self-executing" in *In re Dunar*, 14 I. & N. Dec. 310, 313 (BIA 1973). However, this Court has found *Dunbar* to be "not particularly probative of what the Protocol means." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 439 n.23 (1987). And contrary to petitioners' assertion, as the decision of an inferior administrative body, *Dunar* binds neither the Attorney General nor the remainder of the Executive Branch. Moreover, *Dunar* concluded—in agreement with the uniform judicial view—that the Protocol did not affect the coverage or execution of existing U.S. law. 14 I. & N. Dec. at 313-323.

Treaties of the United States do not ordinarily create rights that are privately enforceable in U.S. courts. See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989); *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 808-810 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985); *Handel* v. *Artukovic*, 601 F. Supp. 1421 (C.D. Cal. 1985). An individual ordinarily can enforce a treaty in court only if it provides a private right of action. See, *e.g.*, *Head Money Cases*, 112 U.S. 580, 598-599 (1884).

Here, the text of the Protocol itself indicates that the parties did not understand it to create private rights of action, but instead contemplated implementation through the domestic law of each contracting State. Article III requires signatories to communicate the means by which they intend to implement the Protocol, thereby indicating that it left the matter of domestic implementation to the parties. See *Gracey*, 600 F. Supp. at 1406.[10] "Such provisions are uniformly declared executory." *United States* v. *Postal*, 589 F.2d 862, 876-877 (5th Cir.), cert. denied, 444 U.S. 832 (1979); see *Tel-Oren*, 726 F.2d at 809 (Bork, J., concurring); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1298-1299 (3d Cir. 1979). Moreover, as we have explained (see page 12, *supra*), the clear understanding of the President and Congress was that the Protocol would not itself be an independent source of rights, but rather would be subsumed within and reconciled with existing domestic law. Similarly, Congress's subsequent attempt, in the Refugee Act of 1980, to clarify domestic law to indicate its agreement with the Protocol, see *INS* v. *Stevic*, 467 U.S. at 425-428,

[10] See also Executive Comm. of the UNHCR Programme, Conclusion No. 57 (XL), *Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (1989) (emphasizing "the need for the full and effective implementation of these instruments by Contracting States").

is inconsistent with the notion that the Protocol was enforceable of its own force.[11]

But even if the Protocol were self-executing in the sense that a court (or administrative body) might refer to it for a rule of decision in disposing of a deportation or exclusion case that was otherwise within its statutorily-conferred jurisdiction, it still would not follow that the Protocol authorizes a court to fashion a novel cause of action for affirmative injunctive relief where Congress has not authorized such a suit. That is especially so as regards persons and events *outside* the United States, where the laws of the United States are presumptively inapplicable, *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227 (1991)—and where, as here, injunctive relief would interfere with military operations on the high seas and a base on foreign soil. Cf. *Argentine Republic*, *supra*.

[11] While petitioners cite (Stay Applic. App. B12, B14, B16) several statements in decisions of this Court or materials preceding ratification that the Protocol is "mandatory" and "obligates" or "binds" the United States to comply with provisions of the Convention, that is not the question here. All treaties are binding and create obligations. The question is to *whom* do the obligations run? By acceding to the Protocol, the United States became obligated to other contracting States to comply with its provisions, but domestic implementation was necessary for the Protocol to be effectuated in the United States. As it happened, Section 243(h) of the INA already provided the necessary statutory mechanism for withholding of deportation. Petitioners rely (Stay Applic. App. B16) on the statement in Justice Scalia's dissenting opinion in *INS* v. *Doherty*, No. 90-925 (Jan. 15, 1992), slip op. 3, that the "nondiscretionary duty imposed by § 243(h) parallels the United States' mandatory *nonrefoulment* obligations under Article 33.1." This statement, however, indicates that the judicially enforceable rights at issue stemmed from the implementing legislation, not directly from the "parallel" obligations of the United States under Article 33.1. Similarly, the discussion in *Stevic* (467 U.S. at 429 n.22) and *Cardoza-Fonseca* (480 U.S. at 440-441), upon which petitioners also rely (Stay Applic. App. B15-B16), in fact confirms that statutory implementation was necessary to give "domestic effect to Article 33.1.

c. Finally, if we assume (contrary to our submission) that Article 33.1 applies outside the territory of the United States and is self-executing, petitioners still would not be entitled to judicial relief. Because Section 2(c) of the Executive Order directs the Coast Guard not to return a refugee to his country of origin without his consent, there is no inconsistency between the interdiction program and the substantive nonrefoulement principle in Article 33.1. To the extent petitioners seek to change the internal procedures for implementing the Executive Order, Article 33.1 likewise furnishes them no assistance, because it does not prescribe particular procedures for the determination of refugee status, and thus mandates no particular role for administrative and judicial officials in the supervision of refugee determinations. Indeed, the U.N. High Commissioner has observed that state parties to the 1951 Convention and the 1967 Protocol "vary considerably" in their practices, including the determination of refugee status by informal, or *ad hoc*, means. See Office of the U.N. High Commissioner for Refugees, *Handbook On Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ¶ 191, at 45 (1988). Clearly, then, Article 33 provides no support for petitioners' attack on the interdiction and repatriation program.

2. Even the district court was unpersuaded by the remaining documents and statutory provisions on which the Haitian petitioners rely in seeking to establish personal rights, cognizable in U.S. courts, under the President's interdiction program. Pet. App. 42, at 52-54. The court of appeals affirmed the rejection of those claims. Pet. App. 56, at 25-30. Those rulings are correct and do not conflict with the decision of any other court, and they therefore do not warrant review here.

a. Nothing in the Executive Order suggests a purpose to create private, judicially enforceable rights. In the

first place, the Order's statement that "no person who is a refugee will be returned without his consent" (see Pet. 3, 17, 28) is a mere proviso to the President's description of what the internal instructions from the Secretary of Transportation to the Coast Guard regarding the interdiction program should include—specifically, a requirement that the Coast Guard return the interdicted vessel and its passengers to the country from which it came, where there is reason to believe that an offense is being committed. § 2(c)(3). "[B]ecause a proviso can only operate within the reach of the principal provision it modifies," *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, No. 90-408 (Jan. 14, 1992), slip op. 10, the proviso here is part of the internal instructions to the Coast Guard, rather than a source of personal rights on the part of individuals external to the Coast Guard's operations.

Furthermore, as the court of appeals pointed out, the Executive Order specifically contemplates interdiction and screening on the high seas, under inherently exigent circumstances and with prompt repatriation of aliens who are found not to qualify for refugee status. Pet. App. 56, at 28. That procedure allows no time or feasible mechanism for judicial review at the behest of affected aliens. Compare *Morris* v. *Gressette*, 432 U.S. 491, 503-505 (1977). In fact, although the Executive Order is unquestionably a valid exercise of the broad Presidential authority granted by the pertinent statutory provisions, 8 U.S.C. 1182(f), 1185(a)(1), nothing in those sections evinces any congressional intent to delegate authority to create private rights of the sort ordinarily necessary for an Executive Order to have the "force and effect of law." See *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 304-306 (1979).

b. The foregoing principles apply with even greater force to INS's internal "Interdiction Guidelines and Operation Instructions" (see Pet. Exh. 7-9) on which

petitioners also rely (Pet. 3, 25, 28). Like the Executive Order under which they were issued, the guidelines lack the "force and effect of law," because they lack a nexus to "some delegation of the requisite legislative authority by Congress." *Chrysler Corp.*, 441 U.S. at 304. As a result, the guidelines are merely internal agency directives of the sort that do not confer any enforceable rights or benefits. *Pasquini* v. *Morris*, 700 F.2d 658, 662 (11th Cir. 1983); *Dong Sik Kwon* v. *INS*, 646 F.2d 909, 918-919 (5th Cir. 1981).

c. Finally, petitioners have no rights under Sections 208 and 243(h) of the INA. As the district court pointed out, "the statutory rights and protections asserted are reserved, by the very terms of the statutes, to aliens within the United States." Pet. App. 42, at 53 (citing 8 U.S.C. 1158 (establishing asylum procedures only for aliens "physically present in the United States or at a land border or port of entry"), and 8 U.S.C. 1251 and 1253(a) (prescribing deportation procedures for aliens "in the United States")). The court of appeals agreed. Pet. App. 56, at 25-27; see also *Gracey*, 600 F. Supp. at 1404. Relief for refugees outside the United States is instead governed by Section 207 of the INA, 8 U.S.C. 1157, which commits such matters to the discretion of the President, in consultation with Congress, and to the discretion of the Attorney General, in implementing the President's decisions—without any provision for judicial review.

Petitioners point out (Stay Applic. App. B29-B30) that prior to its amendment by the Refugee Act of 1980, Section 1253(h) provided that "[t]he Attorney General is authorized to withhold deportation of any alien within the United States," but that the phrase "within the United States" was deleted and a prohibition against "return" of an alien was added in 1980. In petitioners' view, these changes suggest a congressional intent to extend the benefits of Section 1253(h) to any alien, anywhere in the world, who asserts to United States officials

a fear of persecution. That remarkable result would conflict with the limitation of the deportation provisions of the Act (of which Section 1253(h) is a part) to aliens within the United States; contravene the rule against extraterritorial application of an Act of Congress in the absence of a clear statement to that effect; and lack any support in the legislative history. Further, paragraph (2)(C) of 8 U.S.C. 1253(h), also added in 1980, requires reference to the alien's conduct "prior to the arrival of the alien in the United States" in determining his eligibility for relief.

This Court has concluded that the 1980 amendments to Section 1253(h) were designed for the far more modest purpose of conforming its language to Article 33 of the Convention. *Stevic*, 467 U.S. at 421.[12] Article I(F) of the Convention confirms that Article 33 does not apply extraterritorially, because, like 8 U.S.C. 1253(h)(2)(C), it conditions eligibility on the alien's conduct "prior to his admission" to the contracting State. Moreover, the legislative history of the Refugee Act of 1980 shows that the Convention (and thus 8 U.S.C. 1253(h)) were understood to apply to "refugees within the territory of the contracting states." H.R. Rep. No. 608, 96th Cong., 1st Sess. 17 (1979). This background refutes the interdictee petitioners' assertion that Congress has

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[12] The term "return" in Article 33 of the Convention applies only to an alien who is already within the territory of the country (see page 11, *supra*), and there is no reason to believe that the addition of that term to 8 U.S.C. 1253(h) in 1980 had any different import. By the same token, the deletion of the phrase "within the United States" could, at most, have extended 8 U.S.C. 1253(h) to exclusion proceedings, since it was that phrase the Court found significant in *Barber* in holding that Section 1253(h) did not apply in such proceedings. That question will not arise in the future, because the Attorney General, by regulation, has extended to aliens subject to exclusion proceedings the right to seek the relief afforded by 8 U.S.C. 1253(h). See 8 C.F.R. 236.6. In no event, however, would these textual changes give world-wide scope to Section 1253(h).

extended the relevant provisions of U.S. law to the high seas and foreign soil.

3. Finally, the Haitian petitioners invoke the APA to challenge the operation of the interdiction and repatriation program. Pet. 25, 26, 27; Stay Applic. App. B20-B29. As we have explained, however, none of the underlying sources on which the interdictees rely—Article 33.1 of the Convention, the Executive Order, the INS Guidelines, or the INA—affords them any substantive or procedural rights, much less rights that are cognizable in U.S. courts. The interdictees cannot overcome that fundamental defect simply by citing the APA.

Moreover, although the APA permits review of a broad range of administrative actions, it is unavailable where "statutes preclude judicial review" or "action is committed to agency discretion by law." 5 U.S.C. 701 (a). And the "presumption" of reviewability on which petitioners rely (Stay Applic. App. B23-B24) "runs aground when it encounters concerns of national security," and is inapplicable to matters affecting foreign affairs. *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988); *Chaney* v. *Heckler*, 718 F.2d 1174, 1195 (D.C. Cir. 1983) (Scalia, J., dissenting), rev'd, 470 U.S. 821 (1985). Against this background, the court of appeals correctly held that judicial review is foreclosed by both exceptions in 5 U.S.C. 701(a). Once again, that holding does not conflict with any decision of this Court or another court of appeals, and it presents no issue warranting review.

a. As the court of appeals properly recognized, the INA precludes judicial review of claims to asylum by aliens outside the United States. Pet. App. 56, at 15-19. The INA expressly creates rights of review regarding asylum and withholding of deportation claims, but only for aliens "physically present in the United States or at a land border or port of entry" (8 U.S.C. 1158(a)) or aliens "in the United States," and thus subject to the deportation provisions. See 8 U.S.C. 1105a, 1226, 1227,

1253(a). These limitaitons, "fairly discernible in the statutory scheme," leave no question that Congress intended to bar review at the behest of aliens beyond our borders. *Block* v. *Community Nutrtion Institute*, 467 U.S. at 351 [13]; cf. *Ardestani* v. *INS*, 112 S. Ct. 515, 518-519 (1991) (APA inapplicable to administrative procedures under INA).

As the court of appeals also noted, permitting judicial review here, notwithstanding the scheme of the INA, would conflict with a long history of decisions recognizing that Congress has never permitted judicial review of immigration decisions affecting aliens who are outside the United States and have "never presented [themselves] at the borders." *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184 n.3 (1956); see Pet. App. 56, at 17-19. This principle is reflected, for example, in the settled rule that visa decisions by U.S. consular officials are wholly unreviewable, under the APA or otherwise. See *Li Hing of Hong Kong, Inc.* v. *Levin*, 800 F.2d 970, 971 (9th Cir. 1986); *Pena* v. *Kissinger*, 409 F. Supp. 1182, 1185-1186 (S.D.N.Y. 1976). It also is reflected in Section 207 of the Act, which commits matters concerning the admission of refugees from outside the United States to the discretion of the President and the Attorney General, without any provision for judicial review. There is no reason why Haitians on the high seas or in Cuba should have any greater right to judicial review of actions or procedures regarding their claims to refugee status and discretionary relief than those who enter the U.S. embassy in Haiti to seek relief from U.S. consular officials.[14]

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[13] See also *United States* v. *Fausto*, 484 U.S. 439 (1988) (provision for judicial review under Civil Service Reform Act of 1978 for certain categories of employees by implication precludes judicial review for other classes of employees).

[14] Petitioners (Stay Applic. App. B22 n.14) and Judge Hatchett (Pet. App. 56, at 12-13) miss the point by focusing on whether aliens abroad are "persons" for purposes of the APA. The court

b. The court of appeals also correctly held that the subject of petitioners' challenge—the processing of refugee claims of aliens outside the country—is "committed to agency discretion by law." 5 U.S.C. 701(a)(2). Where the applicable statute "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," APA review is precluded. *Heckler* v. *Chaney*, 470 U.S. at 830. In this case the INA furnishes no standards by which a court could assess the propriety of Coast Guard and INS actions in the interdiction program. On the contrary, Congress has granted the President broad discretion to act with regard to the exclusion of aliens "as he shall deem necessary." 8 U.S.C. 1182(f); see also 8 U.S.C. 1185(a)(1). Such provisions provide no discernible standards for judicial review. *Webster* v. *Doe*, 486 U.S. 592, 600-601 (1988).

Nor is there "law to apply," *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971), in the several documents upon which plaintiffs rely, because none purports to lay down any firm rules regarding the *procedures* by which refugee determinations must be made. The Executive Order consists merely of general instructions from the President to Members of his Cabinet regarding the implementation of a law enforcement program. The court of appeals correctly pointed out that the proviso in Section 2(c)(3) "that no person who is a refugee will be returned without his consent" says nothing about how the INS is to determine who is a refugee. Pet. App. 56, at 22. Similarly, the broad instruction to the Attorney General in Section 3 of the Order—to "take whatever steps are necessary" for the fair enforcement of the immigration laws—says nothing about what "steps" he may deem "necessary" to that end. Nor do the INS guidelines provide any standards appropriate for judicial enforcement. Although they offer—consistent with their title—internal operating *guidelines* as to some aspects of conducting interviews, they are prefaced by the recognition that the decision whether shipboard interviews are logistically possible at all must depend upon the discretionary military judgments of the commanding officer of the Coast Guard vessel in question that such activities are "safe and practicable" under the circumstances. Pet. Exh. 9. As demonstrated by the experience in this case, the commitment of pre-screening interviews to the discretion of INS is also strongly reinforced by the disruption of operations that would be caused by judicial review, and by the difficult nature of the judicial inquiry into the details of interviews that occur abroad. Cf. *Colon* v. *Carter*, 633 F.2d 964, 966-967 (1st Cir. 1980) (refusing review of the transfer of refugees to Fort Allen, Puerto Rico); *Perales* v. *Casillas*, 903 F.2d 1043, 1047-1048 (5th Cir. 1990) (declining review of INS voluntary departure determinations).[15]

It is no answer to suggest, as petitioners did below, that while the President's actions in this setting are unreviewable, those of his subordinates in carrying out his directives are not. See Pet. App. 56, at 27. That argument would destroy the President's discretion in all matters other than those that he can execute personally. Yet when the President's subordinates act in the sensitive areas of foreign affairs, border protection, and military

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of appeals did not rest its holding on a contrary proposition, and this case presents no occasion to consider whether aliens outside the United States may ever invoke federal court jurisdiction to bring an APA action. But see *Johnson* v. *Eisentrager*, 339 U.S. 763, 777-778 (1950). Even if we assume, *arguendo*, that such an action might lie, it is the carefully drawn scheme of the INA—which expressly affords judicial review of many immigration matters, while committing others to the sound discretion of the Executive—that bars the present action by aliens outside the United States.

[15] Similarly, as we have explained (see pages 16-17, *supra*), Article 33.1 of the Convention—even if it applied—would prescribe no particular procedures for making refugee determinations.

operations at issue here, "their acts are his acts" and are equally beyond the power of a court to control. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 166 (1803). If a court presumed to interpret the President's orders to his subordinates, assess whether they have effectively carried out the orders, and prescribe the consequences if it believes they have not done so, it would effectively seize all the President's discretion to itself. It would thereby ignore the important fact that the President's control of his subordinates combines a complex system of written directives, oral instructions, and continual monitoring that may result in a constantly evolving pattern of action. To impose on this system a judicial process that moves with untoward slowness may prevent development of policies that can deal effectively with changing world events. Under our system of government, a court's injunctive authority is no substitute for the authority of the President to hire, direct and fire those whom he chooses to implement such policies.

c. Finally, even if judicial review under the APA is not entirely foreclosed by the exceptions in 5 U.S.C. 701(a), the APA does not excuse the courts from their duty "to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702(1). That provision was enacted as part of the 1976 amendments implementing the recommendations of the Administrative Conference of the United States (H.R. Rep. No. 1656, 94th Cong., 2d Sess. 4 (1976); S. Rep. No. 996, 94th Cong., 2d Sess. 3 (1976)), which were designed *inter alia*, to ensure that the waiver of sovereign immunity in the APA did not allow courts to "decide issues about foreign affairs, military policy, and other subjects inappropriate for judicial action" See *Sovereign Immunity: Hearing Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 135 (1970) (report of the Administrative Conference Committee on Judicial Review). As we have explained in our January 30, 1992, application

to this Court for a stay pending appeal (at 16-18, 37-39) and in our memorandum of this date opposing petitioners' application for a stay pending certiorari, the injunctive relief repeatedly granted by the district court in this case impermissibly intruded into those very areas. If the district court instead had "pa[id] particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982), it would have dismissed petitioners' action (as the court of appeals has, at last, ordered), for "[t]he separation of powers problems present here make this virtually a textbook case for refusing * * * discretionary relief." *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1561 (D.C. Cir. 1984) (en banc) (Scalia, J., dissenting), vacated on other grounds, 471 U.S. 1113 (1985). The Court should allow that dismissal of this unprecedented suit to stand.

B. The bulk of the argument in the certiorari petition is devoted not to the contentions on behalf of the interdicted aliens, discussed above, but to the baseless contention by petitioner HRC that it has a First Amendment right to have its representatives enter a U.S. military base in a foreign country or board a U.S. military vessel on the high seas to meet with interdictees who are held in custody. See Pet. 14-17, 20-25. We have fully answered that contention in our January 30, 1992, application (at 22-37) for a stay of the injunction based on this First Amendment claim (which the Court granted), and there accordingly is no reason to repeat that entire discussion here. The court of appeals has now rejected HRC's First Amendment claim, largely for the reasons set forth in our stay application. Pet. App. 56, at 30-38.

The First Amendment ruling below is in full agreement with the only other appellate decision to have considered a similar claim—the D.C. Circuit's decision in *Ukranian American*, which found no right of access even with respect to an alien in custody in the United States—and is fully consistent with this Court's decisions. *A for-*

tiori, there could be no conceivable basis for reinstating the district court's December 20, 1991, injunction barring repatriation of interdictees until HRC has exercised its supposed right of access. Only the individual interdictees (not HRC) have standing to prevent their repatriation. *Whitmore* v. *Arkansas*, 110 S. Ct. 1717, 1725-1726 (1990). Significantly, HRC does not attempt to defend the proposition that it is entitled to an injunction barring repatriations on First Amendment grounds. There accordingly is no basis for the Court to grant certiorari on the First Amendment issue.

Indeed, Judge Hatchett, who was otherwise sympathetic to petitioners' claims, agreed with the majority below that HRC has no First Amendment right of access to Coast Guard cutters. Pet. App. 56, at 4 (dissenting opinion); compare *Gracey*, 809 F.2d at 800 (characterizing such a claim as "frivolous"). Because the program of interdiction, interview, and repatriation is designed to (and did for ten years) take place entirely on Coast Guard cutters—and because interdictees are now in custody at Guantanamo only as a result of the wholly unwarranted injunctions previously entered in this case—it is especially clear that HRC's First Amendment claim does not warrant review.

It bears reiteration that the individual interdictees, who are outside the United States, have no rights under the First Amendment to associate with or speak to representatives of HRC or to petition the United States Government for redress of grievances. Pet. App. 42, at 44-45 n.19; see *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265, 271 (1990); *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 292 (1904). Undeterred by this lack of reciprocal rights on the part of the persons with whom it claims a constitutionally protected right to associate, HRC insists that the First Amendment affords it a right of access to Coast Guard cutters and Guantanamo to speak with and offer legal advice to individual interdictees. However, the interdictees likewise have no

right to the assistance of counsel in connection with the screening process. The absence on the part of the interdictees to *receive* the assistance of counsel is fatal to any assertion by HRC of a constitutional right to *furnish* such assistance. Counsel cannot rely on their own asserted First Amendment rights to intrude themselves into a process in which counsel otherwise have no role, and courts cannot rely on the interests of parties external to an administrative process to impose additional requirements that neither Congress nor the agency has chosen to adopt. Cf. *Vermont Yankee Nuclear Power Corp* v. *NRDC, Inc.*, 435 U.S. 519 (1978).

This conclusion is especially sound here, because the asylum pre-screening process is designed to determine, in an informal, nonadversarial setting, whether an interdictee exhibits a credible fear of persecution. The screening process is necessarily brief, designed to take place on Coast Guard cutters. As the court of appeals poinnted out (Pet. App. 56, at 36-37), providing access to cutters would impose a "substantial burden" on the government. In addition, the presence of counsel would be incompatible with the informal and nonadversarial nature of the screening interview. Contrary to petitioners' contention (Pet. 12-13, 14, 15-17, 20-22) there is nothing improper—or impermissibly "content-" or "viewpoint-based"—about INS's decision to protect the informality and nonadversarial nature of its screening process in this manner, especially in the custodial setting of a military vessel or base, to which the public at large is not invited. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 323-326 (1985); see also *Wolff* v. *McDonnel*, 418 U.S. 539, 570 (1974) (no right to counsel at prison disciplinary proceeding); *United States* v. *Gouveia*, 467 U.S. 180, 185 n.1 (1984).[16]

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[16] Petitioners cite solely to the November 20, 1991 Declaration of Robert K. Wolthuis (Pet. 19 n.17) to support their extraordinary assertion that respondents have relied upon "fraudulent

If the government must allow representatives of HRC to board a Coast Guard cutter or enter Guantanamo so they can speak with and advise interdictees held in custody there, any organization or person interested in assisting or advising interdictees would have a similiar First Amendment claim. See *Ukranian-American*, 893 F.2d at 1381-1382. The fact that HRC's organizational purpose is concerned with Haitian migrants does not give it an interest distinct from any other member of the public in this regard. Cf. *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-486 (1982).

Nor is HRC's position advanced by its reliance (Pet. 20, 22-24) on its status as counsel in this class action. Otherwise, an organization could circumvent wholly legitimate custodial arrangements and administrative procedures—and claim a right to alter them on a program-

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declarations" (Pet. 18) in this case. That declaration, along with five others, was submitted in the district court in support of the government's motion to vacate or stay the temporary restraining order issued the previous day—just hours after petitioners filed their complaint. It appears to have been cited twice on appeal, in our November 21, 1991 stay motion (in No. 91-6027, at 7) and in our December 4, 1991 stay motion (in No. 91-6060), both times for the noncontroversial proposition that the United States had initiated a multinational diplomatic effort to deal with the Haitian crisis—a proposition independently supported by the concurrent citation in both motions to the Declaration of Assistant Secretary of State Bernard W. Aronson, also filed in the district court on November 20. Moreover, as plainly revealed in the very deposition testimony cited by petitioners, there was nothing sinister about Mr. Wolthuis' acting in the capacity of Assistant Secretary of Defense for International Security Affairs on November 20, 1991, the day he was called upon to execute a declaration as the temporary head of the office. The Assistant Secretary position had been vacant since late August; Mr. Wolthuis was the Deputy Assistant Secretary of Defense for Global Affairs; and when the principal deputy, who usually served as Acting Assistant Secretary was out of the country (as he was on that day), the position is temporarily filled by one of the remaining deputies on a rotating basis. See Pet. App. 78, at 5-6.

wide basis—through the simple expedient of filing a lawsuit. Moreover, HRC acts as counsel only with respect to the class claims in this litigation; that is something quite different from serving as counsel to each interdictee with respect to his own potential claim for asylum.

Finally, there is no merit to petitioners' legal contention (Pet. 15-17, 20-22), made for the first time in this Court, that respondents have arbitrarily denied access to HRC, while broadly permitting access to Guantanamo and even Coast Guard cutters to others.[17] As detailed in the Affidavit of John W. Cummings, Acting Assistant Commissioner of INS for Refugees, Asylum and Parole, the present policy is to permit access only to the following non-government personnel: (1) persons approved to participate in the screening process in some official capacity, such as the UNHCR; (2) members of the press, whose access does not include attendance at actual interviews; and (3) certain others, such as religious workers, who may furnish essential services to the aliens. Cummings Aff. ¶¶ 10-11 (Pet. App. 71).

Petitioners can establish no flaw in these criteria as means of regulating access. The presence of representatives of UNHCR or comparable organizations to observe and assist in the official business of the camps in no way imparts an obligation to allow private groups, such as HRC, to do the same or to enter the camps for other purposes. Similarly, providing limited access to members of the press—whose purpose of informing the American

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[17] As the court of appeals observed (Pet. App. 56, at 32 n.7), the district court noted that there was no allegation that the denial of access to HRC was the product of viewpoint discrimination, and petitioners' brief on appeal likewise did not claim discrimination. Moreover, although the district court observed in its December 20 order that the government had granted access to Guantanamo by the U.N. High Commissioner for Refugees (UNHCR) and the press (Pet. App. 46, at 9), that did not constitute a finding of viewpoint discrimination. Rather, it appears to have been an effort to justify the court's First Amendment-based injunction against repatriations, on the ground that it would not be intrusive.

public about the events transpiring in the interdiction program is altogether different (and less intrusive) than the role of counsel that HRC seeks to play—is an eminently reasonable accommodation, fully consonant with First Amendment values. And in support of its assertion that the government has opened the camps to other groups, HRC cites two affidavits describing visits by a priest and by an organization called Lutheran Ministries. See Pet. 22 n.19 (citing Punancy Aff. (Pet. App. 31) and Wenski Aff. (Pet. App. 68)). The fact that such an organization was given access in no way undermines the legitimacy of the policy outlined above—even if, in one instance, it turned out that the visit went beyond religious ministry and included the sort of activities in which HRC seeks to engage. Punancy Aff. ¶¶ 1-2, 5.

In any event, as we have pointed out above (see page 4, *supra*), HRC *was* granted access to camps and cutters at Guantanamo through the visit of its team of lawyers and support staff in November 1991. HRC does not show —or even claim—that this access was inferior to that granted any comparable group. Petitioners' belated reformulation of their sweeping First Amendment claim into one of discrimination therefore manifestly does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

92 Civ. 1258

Johnson, J.

HAITIAN CENTERS COUNCIL, INC., ET AL., PLAINTIFFS

vs.

GENE MCNARY, Commissioner, Immigration and Naturalization Service, ET AL., DEFENDANTS

PLAINTIFFS' NOTICE OF MOTION FOR PROVISIONAL CLASS CERTIFICATION

SIRS:

PLEASE TAKE NOTICE that on the 1st day of April, 1992 at 2:00 p.m., or as soon thereafter as counsel may be heard, the undersigned attorneys for the plaintiffs, will move before the Honorable Sterling Johnson sitting at the United States District Court House for the Eastern District of New York, Brooklyn, New York for an Order pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure declaring that the above-entitled action be provisionally maintained as a class action on behalf of classes consisting of:

1. All Haitian citizens who have been or will be "screened-in" or who have been "screened-in" and subsequently screened out, including those who have been or may be subject to or who have resisted additional screening procedures, and are now or will be detained on Guantanamo Bay Naval Base, any other territory subject to United States jurisdiction or Coast Guard cutters (hereinafter "screened-in plaintiffs");
2. All Haitian citizens who have retained or will retain or wish to retain plaintiff Haitian Service

Organizations as counsel or who have the right to obtain assistance of counsel from Haitian Service Organizations and/or other persons (hereinafter "Haitian Service Organization clients");

3. All legal residents and citizens of the United States who are fathers, mothers, sons, daughters, siblings, cousins and close relations of members of any of the above classes who have been deprived of their rights to associate with their immediate relatives because of defendants' actions (hereinafter "immediate relatives").

TAKE FURTHER NOTICE that in support hereof plaintiffs shall rely upon the memorandum of law filed herewith and the pleadings and other papers heretofore filed in this action.

Dated: April 1, 1992
New York, New York

Respectfully submitted,

CENTER FOR CONSTITUTIONAL RIGHTS

By: /s/ Michael Ratner
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BY FAX
April 22, 1992

Mr. Francis J. Lorson, Esq.
Chief Deputy Clerk
United States Supreme Court
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Washington, D.C. 20543

RE: Gene McNary, et al. v. Haitian Centers Council, Inc., et al. (Civ. No. 92-1258 E.D.N.Y.), *appeal pending*, No. 92-6090 (2d Cir. 1992) (Second Circuit argument scheduled May 7 or 8, 1992)

Dear Mr. Lorson:

We understand that the Solicitor General's application to Justice Thomas, as Second Circuit Justice, for a stay pending appeal to the Second Circuit of Judge Sterling Johnson's preliminary injunction order in this case has been referred to the Conference. We respectfully request that you transmit this letter to the full Court for its consideration.

Attached to the Government's application at page 190 is the uncross-examined Declaration of Donna Hrinak, Deputy Assistant Secretary of States for Mexico and Caribbean Affairs, Bureau of Inter-American Affairs,

dated April 20, 1992, which was not part of the record before the District Court in this case. Ms. Hrinak's declaration cites recent Coast Guard figures regarding the interdiction of fleeing Haitians, claims "that the injunctive relief ordered by the District Court in this case has contributed in significant part to the increased outflow of Haitians from Haiti," *id.* at 190, and concludes that "the mere existence of pending litigation, and particularly the existence of any kind of injunctive relief against the United States Government, acts as a magnet for Haitians to leave Haiti." *Id.* at 193.

As we noted on page 12 of our Memorandum requesting Summary Denial of the Government's Extraordinary Application for a Stay Pending Appeal, after a five and one-half hour hearing that included live testimony, Judge Johnson's preliminary injunction opinion found the Government's evidence regarding such a "magnet effect" to be "inconclusive." PI Op. at 12. At the preliminary injunction hearing, the Government presented absolutely no evidence to link the increased number of Haitian interdictees with the District Court's order. On the other hand, respondents presented numerous reasons why Haitians have been interdicted in large numbers in the last few weeks, including evidence that substantial numbers of Haitians who had landed in Cuba had recently been expelled onto the high seas by Castro. *See* PI. Exh. # 69 at 62; PI Transcript at 108-11.

Given this background, the Hrinak Declaration filed yesterday appears to be yet another Government attempt to use uncross-examined extra-record affidavits manufactured for the purpose of appellate litigation to mislead the Supreme Court to stay this Court's lawful order. The Government has now failed to stay that order on four successive occasions, twice before Judge Johnson and twice before the Second Circuit (Pratt, Timbers & Mukasey, JJ.). In *Haitian Refugee Center v. Baker*, 112 S.Ct. 1245 (1992), an earlier case before this Court, the Solicitor

General's successful January 31, 1992 application to this Court for a stay of the District Court's injunctive relief similarly relied upon untested allegations in extra-record affidavits that did not survive subsequent cross-examination.[1]

To forestall another round of such Government misconduct, following the filing of the stay application yesterday, respondents sought a status conference with Judge Johnson, on the record, and requested that he permit us to take the deposition of Ms. Hrinak immediately, so as cross-examine her with regard to the "magnet effect" allegations made in her declaration. Judge Johnson expressed concern on the record that the Government appeared to be "stacking the deck," by including for the first time in a stay application before this Court a declaration that had not been subject to cross-examination. Accordingly, Judge Johnson directed the Government to inform this Court that the Hrinak Declaration had been generated for the first time on appeal and had not been part of the record before the District Court. Judge Johnson further advised respondents to move before this Court either to strike the Hrinak Declaration from the record or, in the alternative,

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[1] For example, the Solicitor General filed the affidavit of Admiral William P. Leahy, Jr. before the Supreme Court, affirming that having counsel from the Haitian Refugee Center present on Coast Guard cutters would interfere drastically with operations. Upon later deposition, Admiral Leahy testified that his own 14 year-old son had spent two weeks on a Coast Guard cutter during an operational law enforcement mission. Similarly, Assistant Secretary of State Bernard Aronson declared that he had "credible reports" that as many as 20,000 Haitians were "massing on one of Haiti's coasts preparing to depart by sea for the United States." In subsequent deposition, however, Aronson conceded that "massing" was "an ambiguous term," that they were not "gathered in some huge group," and that he could not be sure of how many there actually were. *See generally HRC v. Baker*, Plaintiffs' Application to Stay the Mandates of the United States Court of Appeals for the Eleventh Circuit Pending Certiorari at 31-41.

to supplement the record before this Court with a deposition of Ms. Hrinak or counter-declarations regarding the "so-called" magnet effect.

Accordingly, respondents hereby request that this Court take judicial notice of the attached "Chronology of Events in Haiti Since March 18, 1992," drawn from the wire services and newspaper accounts. *See* Appendix A. These events, which include the collapse of an international plan for returning President Aristide to Haiti and a new wave of violence and beatings by the Haitian military, are also recounted in the attached Declaration of Jocelyn McCalla of the National Center for Haitian Refugees, who has just returned from seven days in Haiti. *See* Appendix B. The events recounted in these appendices wholly rebut the Government's unfounded claim of irreparable injury from the District Court's order by providing ample reason, wholly unrelated to that order, why Haitians might have begun to flee Haiti in enlarged numbers in late March.

Now that the Court as a whole is considering the Government's stay application, respondents reiterate their request that that application be summarily denied, or that respondents be given an opportunity to file a responsive memorandum of law within twenty-four hours of the Court's call for a response. Respondents reiterate that the only issue raised by this stay is whether our clients—three legal service organizations and their Haitian clients, who are being held in custody, incommunicado, and against their will on territory subject to complete U.S. jurisdiction and control—will have an opportunity to talk to one another before the Second Circuit resolves the appeal.

Given that thirty-four credible asylum applicants will be sent back just as soon [as] Judge Johnson's order is stayed; that conditions in Haiti appear to be rapidly deteriorating; that respondent Haitian Service Organizations are suffering daily and irreparable injury to their First Amendment rights because the Government

denies them access to their clients; that no probative evidence has been offered regarding any magnet effect caused by Judge Johnson's order, that that order does not affect the Government's power to repatriate Haitians who have been "screened-out," *i.e.*, found not to have a credible fear of political persecution, or even "screened-in" (so long as they have been adequately counseled); that no *certiorari* petition is or will soon be pending before this Court; that the Second Circuit is already scheduled to hear an expedited appeal in this case in about two weeks; and that the Government's arguments against the order have already been rejected six successive times, without dissent, by two federal courts, respondents again respectfully urge this Court to deny the stay requested in this case.

Very truly yours,

/s/ Harold Hongju Koh
HAROLD HONGJU KOH
Council for Plaintiffs
Haitian Centers Council, Inc., et al.

Appendix A: Chronology of Recent Events in Haiti Since March 18, 1992

Appendix B: Declaration of Jocelyn McCalla

cc: The Honorable Sterling Johnson, Jr., EDNY
Scott Dunn, Esq., AUSA-EDNY
Ronald Mann, Esq., Solicitor General's Office, DOJ
John F. Daly, Esq., Civil Appellate, DOJ
Robert Bombaugh, Esq., OIL-DOJ

APPENDIX A

CHRONOLOGY OF EVENTS IN HAITI SINCE MARCH 18, 1992:

Compiled from Wire Services and Newspapers

• *March 18, 1992*: Haitian lawmakers shout, shove and brandish guns on the assembly floor during the legislative session in which they consider ratification of the agreement to return Aristide to power, which was sponsored by the Organization of the American States (OAS). Under pressure from military officers in support of the coup, the lawmakers fail to ratify the agreement.

> *See* Howard W. French, *Haiti Accord Is Set Back in Parliament*, N.Y. Times, March 20, 1992; Kenneth Freed, *Haiti Plan for Aristide's Return Just Barely Alive*, Los Angeles Times, March 20, 1992 at A40 ("At another point [during the parliamentary session], Deputy Josue LaFrance pulled a pistol from the waistband of his trousers during a confrontation with an unnamed foe, sending reporters in a nearby press gallery scurrying."); Luc Desmarins, *Haiti: Six Months On, Interim Regime Shows No Sign of Quitting*, Inter Press Service, March 27, 1992.

• *March 27, 1992*: The Haitian Supreme Court, surrounded by gunmen supporting coup leader Joseph Nerette, reject the OAS-sponsored agreement to return Aristide to power, ruling it unconstitutional.

> *See* Roosevelt Jean-Francois, *Haitian Lawmakers Call for Ratification of Washington Accord*, United Press International, April 6, 1992; *Haitian Court Rejects OAS-Backed Plan*, Chicago Tribune, March 29, 1992 at 24; Canute James, *Haiti Warns Aristide Supporters*, Financial Times, March 31, 1992 at 6 ("[C]ourt's ruling, following submissions by the army-backed government, and the subsequent threats to the legislators, has scuttled any hopes of an early return by Mr. Aristide, and has strengthened the hand of the army. . .")

• *March 28, 1992*: Haiti's military rulers threaten to arrest parliamentarians who try to ratify an agreement that would allow Aristide to return to the country.

> *See* Michael Tarr, *Haiti Government Threatens Lawmakers Who Defy Court with Arrest*, Reuters, March 29, 1992; Canute James, *Haiti Warns Aristide Supporters*, Financial Times Limited, March 31, 1992 at 6.

• *April 3, 1992*: Armed civilians and soldiers beat university students "who were about to begin a protest against the military-backed government." Soldiers used rifle butts to strike students and professors in the head and face, and kept approximately 100 students from leaving the campus for several hours.

> *See Haitian Military Blocks Student Protest*, Reuters, April 3, 1992.

• *April 5, 1992*: Members of the military, who are "moving through the street to cut down opponents and scatter would-be demonstrators with random gunfire," have "all but quieted Haiti's once vigorous press corps." Soldiers rampaged through studios, riddling them with bullets and destroying transmitters and antennas.

> *See* Howard W. French, *Crackdown Keeps Haiti Radio Silent*, New York Times, April 5, 1992 at 14.

• *April 6, 1992*: In several neighborhoods of Port au Prince, police violently disperse and beat protestors who demonstrated in order to show their support for Aristide and to call for the ratification of the OAS accord. Several people are arrested, including a young boy who was returning from school. A group of 50 Senators and deputies

urge the National Assembly speaker to call the legislature into session in order to allow them to ratify the accord.

See Protestors and Lawmakers Call for Ratification of Accord, Agence France Presse, April 6, 1992; *Haitian Government Breaks Up Protests*, Reuter Library Report, April 6, 1992; *Haiti:Pro-Aristide Demonstration Follows Visit by U.S. Official*, Inter Press Service, April 6, 1992.

• *April 8, 1992*: Radio Tropic, "one of the few independent stations still broadcasting news," and some university professors defend themselves against "what they termed false charges spread by the government-controlled Radio Nationale." Lucien Pardo, leader of the social democrat KONAKOM party, was detained by the military for several hours and soldiers surrounded the school he owned in Gonaives.

See Haitian Radio, Professors Defend Against Charges, Reuters, April 8, 1992.

Robert Gelbard, Principal Deputy Assistant Secretary of State for Inter-American Affairs, visits Haiti, and Haitian politicians who met with him state that "he had clearly implied that if a solution to the crisis was not found within the next five weeks, an invasion might be considered."

See Haitian Government Proposes "National Conference" on Crisis, Reuter Library Report, April 8, 1992.

• *April 9, 1992*: Haiti's interim government, led by coup leader Joseph Nerette, reiterates its opposition to the OAS accords and calls for a Haitian national conference to discuss Haiti's own solutions to its political crisis. Members of Parliament strongly object, depending the proposal as an attempt to delay resolution of the crisis and circumvent the OAS accord.

See Haiti: Parliamentarians Oppose Call for National Conference, Inter Press Service, April 9, 1992; *Haitian Government Proposes "National Conference" on Crisis*, Reuters, April 8, 1992.

Reuters reports that Radio Antilles journalist Paul Jean Mario, detained since November by the military, was reported to be "near death from being beaten and deprived of his medication needed to control bleeding from earlier beatings." Furthermore, Inter Press Service reports that "seven young people in Petionville . . . were arrested by the police, who accused them of planning a pro-Aristide demonstration" and that one of the youths "was wounded when police shot him in the feet."

See Haiti Government "Conference" Knocked; Reporter Feared Near Death, Reuters, April 9, 1992; *Haiti: Journalist Tortured as Selective Repression Continues*, Inter Press Service, April 8, 1992.

• *April 10, 1992*: During a pro-Aristide demonstration at a cathedral in Port-au-Prince, soldiers arrest at least ten students and beat them while forcing them into police trucks. Soldiers also arrest journalists from Radio Cacique, Agence France Presse, and Inferno magazine who were observing the demonstration and confiscated some equipment. Inter Press Service reports that these protests came "just a few hours after the military endorsed a call by Haiti's interim government for a national conference." A separate protest is staged at the University of Haiti.

See Soldiers Arrest Student Demonstrators, 3 Journalists, Reuters, April 10, 1992; *Haiti: Calls for Aristide's Return Become Louder*, Inter Press Service, April 10, 1992.

• *April 12, 1992:* Radio Tropic freelancer Sony Esteus is arrested and beaten at a mass at Saint Michel Church in Port au Prince. He is reported to be "in serious condi-

tion with broken bones." Soldiers also surrounded the church "to prevent anti-government demonstrations after the mass."

See Haiti Minister Resigns, Military Denies Beating Journalists, Reuter Library Report, April 14, 1992.

During a speech by interim President Nerette, Aristide supporters burn the Chamber of Commerce and a Catholic church in Port de Paix.

See Robin L. Wolfgang, Aristide Backers Burn Church During Haitian President's Speech, U.S. Newswire, April 13, 1992.

• *April 13, 1992:* Nerette's government cancels a rally in support of his reform proposals, which had been scheduled for April 14, 1992, because of threats of violence made by Aristide supporters.

See Robin L. Wolfgang, *Aristide Backers Burn Church During Haitian President's Speech*, U.S. Newswire, April 13, 1992.

Radio Tropic reports that the Haitian parliament "by general consensus" rejected the Nerette government's proposal for a national conference, and moved to revive the ratification process for the OAS accord.

See Haiti Interior Minister Resigns; Assembly Rejects National Conference Proposal, British Broadcasting Corporation, Summary of World Broadcasts, April 16, 1992.

• *April 14, 1992:* Haiti's interim premier, Jean-Jacques Honorat, reshuffles the Haitian cabinet, replacing seven out of 12 cabinet ministers. Nerette approves the reshuffling. Nerette and Honorat announce no new strategy to end Haiti's political crisis.

See Haiti's Provisional Premier Reshuffles Cabinet, Agence France Presse, April 15, 1992; *Haiti Seven New Ministers Appointed in Cabinet Reshuffle*, British Broadcasting Corporation, Summary of World Broadcasters, April 17, 1992.

• *April 15, 1992:* New cabinet officials are sworn in. Ceremonies are boycotted by parliamentary leaders, which OAS officials state is an indication that the majority in the parliament backed the OAS-sponsored agreement. Despite this sentiment in the parliament, Honorat announces at the ceremony that his government "will no longer sit to negotiate with any white."

See Haiti: Accord "Does Not Exist" Says Interim President, Inter Press Service, April 16, 1992; *Haiti's Prime Minister Denounces Negotiations with "Whites"*, Reuters, April 15, 1992.

Radio Tropic, one of the few remaining independent news sources in Haiti, ceases local news broadcasts because of increased threats to its staff. Information director Henri Alphonse goes into hiding.

See Haiti's Prime Minister Denounces Negotiations with "Whites", Reuters, April 15, 1992.

• *April 16, 1992:* Interim President Nerette describes the OAS accord as invalid and says it "does not exist." He also states that if Aristide returned to Haiti he would face trial for "crimes and felonies that he's been accused of."

See Haiti: Accord "Does Not Exist" Says Interim President, Inter Press Service, April 16, 1992; David Haskel, *U.S., OAS Accused of Racial Bias Against Haiti*, Reuter Library Report, April 16, 1992.

Noting that a "new wave of Haitian boat people" has fled Haiti, the Washington Post reports that "officials and advocates for the Haitians said an important factor was the collapse last month of a political agreement that would have returned to power ousted President Jean-Bertrand Aristide." A senior official is described as say-

ing: "When the Haitians felt things were going to improve . . . such as after the accords were signed, they stayed in Haiti. Now, they may feel there is no hope for a political solution, and they have begun leaving again . . ."

See Al Kamen, *Large Wave of Boat People Sails from Haiti*, Washington Post, April 16, 1992 at A6.

• *April 17, 1992:* On Good Friday, the military block a procession attempting to leave St. Gerard Church in Carrefour Feuilles, an area of Port au Prince where the military is unpopular. The military closely patrolled religious ceremonies.

See Haitian Military Stops Anti-Government Songs of Street Bands, Reuters, April 20, 1992.

• *April 18, 1992:* Radio Tropic resumes its local news reports despite threats to its staff. Its news director, however, remains in hiding.

See Haitian Military Stops Anti-Government Songs of Street Bands, Reuters, April 20, 1992.

• *April 20, 1992:* Over Easter weekend, Haitian soldiers break into a crowd of 2,000 street dancers celebrating in Port au Prince, arresting 15 people and beating many more. The dancers are members of religious bands whose songs often express pro-Aristide sentiments. Reuters reports that the intent of the soldiers' violence was to "stop any hint of criticism of the military-backed government," and that human rights activists said that "police were making examples of people in front of large crowds to deter any anti-government demonstrations." According to a Radio Tropic reporter who was himself detained overnight, there were also many beaten and arrested in the city of Jacmel.

See Haitian Military Stops Anti-Government Songs of Street Bands, Reuters, April 20, 1992.

APPENDIX B

DECLARATION OF JOCELYN McCALLA

1) I am the Executive Director of the National Coalition for Haitian Refugees. I routinely monitor human rights conditions in Haiti and I have written, contributed to and edited reports on such conditions over the past six years as part of efforts, ordinarily conducted jointly with Americas Watch, to promote compliance with internationally-sanctioned human rights standards in Haiti.

2) I have visited Haiti for a seven-day period from April 10 through April 17, 1992, with the goal of assessing political and human rights conditions in that country at this time.

3) In the course of my visit, I met with human rights monitors, lawyers representing persons arrested arbitrarily by Haitian military authorities, political leaders and representatives of the press. At the end of my visit I came to the conclusion that the two groups in the country that continue to be most at risk of military persecution, intimidation, illegal arrests, torture and other physical abuse, include the press and members of grassroots organizations. These organizations include but are not limited to church-affiliated groups, "gwoupman" or peasant cooperatives, farmers associations and other similar associations that are established primarily in rural areas.

4) Many independent radio stations in Haiti remain off the air for fear of retaliation from government security forces if they broadcast news that appears even remotely critical of the military regime. Those which do operate in Haiti practice self-censorship. During my visit Radio Tropic temporarily suspended broadcasting domestic news following threats made to the employees of this station. Its news director, Mr. Henri Alphonse, had to go into

hiding on April 14, 1992, because of fear of assassination based on direct threats made by a visiting military officer. To the best of my information and belief, he remains in hiding at this time. Two days earlier on April 12, a correspondent of Radio Tropic was arbitrarily arrested by a military patrol of around six soldiers following a church service that he was covering as a reporter. Both of his arms were broken during that arrest.

5) In the countryside, the Haitian military continues to maintain a tight grip on group activities, whether of an economic, social or political nature. Meetings continue to be prohibited by the military regime. Strict control of vehicular traffic to and from the countryside has been established. Passengers and the vehicles in which they are riding are routinely and thoroughly searched for materials critical of the military regime.

6) Religious gatherings are under constant surveillance because they provide a forum for people to meet and collectively discuss community affairs and activities. During Holy Week (April 12 through April 19), many Easter celebrations featuring traditional group singing and dancing in the streets were attacked by military units that arrested and physically abused several participants because their religious chants were ruled threatening to the military regime. Military-sponsored political violence in the countryside remains as widespread today as the days immediately following the September 1991 Coup. Consequently, the risk of persecution and of being killed by military personnel who enjoy immunity from prosecution constitutes a grave danger to the Haitians.

7) Members of the National Coalition for Haitian Refugees have spoken with Haitian refugees on a daily basis regarding their motivations for leaving Haiti and from these conversations it is clear that these internal, political factors—not some so-called "magnet effect" from U.S.

court orders—weigh decisively in the determination of Haitians to risk their lives at sea and seek safety outside the border of their own country. To claim otherwise is to consciously ignore the reality of oppression and repression which daily plagues the lives of ordinary Haitians.

I declare under penalty of perjury that the foregoing is true and correct.

This 22nd day of April, 1992

JOCELYN MCCALLA *

New Haven

* Original has been signed and shall be submitted to the Court upon receipt.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

TRANSCRIPT OF TELEPHONE CONFERENCE CALL BEFORE THE HONORABLE STERLING JOHNSON, JR. UNITED STATES DISTRICT JUDGE

* * * * *

[2] THE COURT: Hello.

Also present in my office is Scott Dunn, Bob Bergliter, Tawana, Gail, Betsy, a court reporter.

Go ahead.

MR. CAPPUCCIO: I'm not sure what the call is about except that I sent a letter today.

THE COURT: I am in receipt of the letter and Mr. Koh hadn't gotten a copy of the letter, and I think we faxed him a copy.

Have you read the letter, Mr. Koh?

MR. KOH: Yes. I actually had some comment to make.

* * * * *

[5] By then, there happened to be a boat leaving that day, and I don't know what systems, to be honest with you, the military uses for determining exactly who is going on the boat, but it obviously has to be people who are screened-out.

But in the have-to-do-this, these people who were initially screened-out were screened-in—were put on the boat because the military was not aware that the reversal had been made or perhaps the reversal hasn't been made yet.

THE COURT: You say a reversal had been made but not communicated, is that it?

MR. CAPPUCCIO: I don't know which of the two it is, your Honor.

THE COURT: Okay.

MR. CAPPUCCIO: I am trying to find that out. Whatever the problem was, it is simply intolerable that people are being put on a boat before it is definitively determined that they have gone through quality review.

This is an unacceptable lack of communication between the military that is—you know, the military is very operational and very efficient—and the INS, which has their procedures and their time frame to do quality review.

About the only thing I can tell you is that my boss, the Attorney General, and his colleagues, Secretary of Defense, has to tell these people, and they are, that there is [6] no way that doing this efficiently can be done at the cost of a mistake like this being made. We have to be sure.

If we are going to have the second level of review for benefit of the doubt, which I think is a good and generous thing, we have to be damned sure that people have gone through it before we load people on a boat. That is my understanding the first incident.

I understand it may have occurred on a separate occasion on Monday, but my understanding was those people were never returned to Haiti. They were on the boat but they were brought back to the United States.

I don't know if that is the most current information. I can't represent that as 100 percent true but that is what I know so far.

THE COURT: Can you tell me who is in charge of that operation down there?

MR. CAPPUCCIO: In Gitmo.

THE COURT: Yes.

MR. CAPPUCCIO: General Wal—

THE COURT: Not the military, but the person responsible for screening in/screening out or particularly screening in and making sure the people are not repatriated to Haiti once they have been screened-in.

MR. CAPPUCCIO: The problem is, it is a joint task force. That's what JTF is.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE STERLING JOHNSON, JR.,
UNITED STATES DISTRICT JUDGE

* * * * *

[61] * * * I recall the argument that was made because of my injunction there would be magnet effect and when this case went up to the Supreme Court and they lifted the stay people kept coming in droves. In fact, more people came after the stay was lifted than came before.

MR. STARR: Your Honor, we may agree to this degree, that I believe that just the pendency of litigation based on affidavits that we have filed both in the district court in the Southern District of Florida, in the 11th circuit, based upon our experts that the tendency of litigation has, in fact, had a magnet effect. We have never said and I want to be very clear about this, that there are not other factors. This is an enormously complicated and an unhappy and tragic situation. Obviously sanctions are being imposed.

May I say just a word about the sanctions? This is why—this is a position of the Organization of the American States. United Nations has essentially looked to the OAS not to the United States, but to the OAS. We are a member of the OAS. The OAS has determined that the appropriate policy, and this is a policy by consensus, at this time is an embargo.

There is no question I think in one's mind that deteriorating economic conditions can produce an outflow because of the hardships caused by an embargo. * * * *

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BY FAX

April 28, 1992

The Honorable Sterling Johnson, Jr.
U.S. District Court
Eastern District of New York
225 Cadman Plaza
Brooklyn, NY 11201

Re: No. 92-1258, *Haitian Centers Council Inc. v. McNary*

Dear Judge Johnson:

We file this letter only with reluctance, and based upon the most troubling and disturbing news. Based upon information received last night, we now have reason to believe: first, that if you do not immediately rule on our request for an injunction pending the appeal under Rule 62(c) of the Federal Rules of Civil Procedure, our case may very well be moot before we appear before the Second Circuit on May 8; and second, that defendants' mistreatment of Haitians on Guantanamo is proceeding at a scale even beyond our previous fears.

Last night a Catholic priest who had been on Guantanamo until yesterday contacted us with the information contained in the attached declaration: that since the Supreme Court granted its stay last Wednesday, U.S. officials have reinterviewed and repatriated 57 HIV-positive Haitian plaintiffs, will likely repatriate a further 102 plaintiffs today, and by May 8 (the date the Court of Appeals is scheduled to hear the appeal in this case), will likely send all HIV-positive plaintiffs, and perhaps all screened-in plaintiffs, out of Guantanamo.

The group of 102 (names attached) that is scheduled to return today has repeatedly and vociferously protested their pending uncounseled repatriation. That group includes two of our named plaintiffs, Dr. Frantz Guerrier (Declaration at P.E. 45) and Milot Baptiste (Declaration at P.E. 66), as well as five other individuals who retained us as counsel and were interviewed by our team when they visited Guantanamo under your order at the end of March: Chery Martin (Declaration at P.E. 59), Soinel Joseph (Declaration at P.E. 41), Examine Pierre (Declaration at P.E. 58), Wiguens Constant, and Jean-Pierre Dieuseul (Declaration at P.E. 71). These individuals are among the most politically active Haitians at Guantanamo —a fact that virtually ensures that they will face torture or death if returned to Haiti. Moreover, they are being repatriated based solely on the fact that they insist on their legal right to a fair determination, with counsel, of their refugee status. Defendants emphatically have *not* reached any determination of the strength of these plaintiffs' claims to asylum.

The priest overheard American military authorities planning to use force, if necessary, to compel these plaintiffs to return. In addition, the priest personally witnessed, and unsuccessfully tried to stop, American MP's in riot gear severely beating a Haitian refugee, breaking open his skull. *See* paragraph 7 of Fabre Declaration.

This information shocks the conscience. Based upon this information, and that previously submitted to the Court, we most urgently renew our request that you grant our request for an injunction pending appeal temporarily blocking the rescreening and repatriation of any screened-in plaintiffs, which is still pending before you. We do not request access at this time to these plaintiffs, merely that you spare them from immediate and irreparable injury pending disposition of the appeal before the Court of Appeals.

We return to you with this request not to burden you, or out of any disrespect for your past rulings. Your

April 27, 1992 order reserving judgment on our TRO request did not pass on our separate request for an injunction during the pendency of the appeal under Fed. R.Civ.Pro. Rule 62(c) to preserve this Court's jurisdiction pending the appeal. *See* page 2 of our application. As the above facts show, with each passing hour, the likelihood dramatically increases that, by the time the Second Circuit rules on the pending appeal of your Preliminary Injunction, plaintiffs case will be moot and this Court will have lost jurisdiction over not only the issues that are currently on appeal, but also every other legal claim made by plaintiffs (including the four on which you have expressly reserved judgment). We return to you with this request simply because if you do not rule, we may have no case left by the time we appear before the Second Circuit and our clients may have been irreparably brutalized.

We reemphasize that the Supreme Court's stay, issued on April 22, 1992, stays *only* the injunctive relief that you have entered on First Amendment and Fifth Amendment Due Process grounds. This Court retains full authority and jurisdiction to issue relief on any other grounds, particularly when such relief is necessary to preserve this Court's jurisdiction over the case. Indeed, it is entirely appropriate for a district court to enter limited, temporary injunctive relief while an appeal is pending "when it is necessary to preserve the status quo," *Kidder v. Maxus*, 925 F.2d 556, 565 (2d Cir. 1991). If you do not now rule, defendants may brutalize and repatriate all of our clients, simply leaving no case to be argued to the Second Circuit.

Sincerely,

/s/ Harold Hongju Koh
HAROLD HONGJU KOH
Counsel for the Plaintiffs,
Haitian Centers Council, Inc., et al.

Attachments

ATTACHMENT A

DECLARATION OF FATHER JACQUES FABRE

1. My name is Father Jacques Fabre, and I am a priest in the Society of St. Charles. I have been a missionary for refugees and migrants assigned to Guantanamo Bay. The Society's base is the Provincial House of the Society of St. Charles in Greenwich Village, New York City. I am fluent in English and Creole, and from December 24, 1991 until April 27, 1992 I served at the U.S. military base on Guantanamo Bay, Cuba, administering to the thousands of Haitian refugees there. Except for a one week trip to the U.S. in early February, I remained on the base for the entire period.

2. On Thursday, April 23, the day after the Supreme Court decision, all asylum officers at Guantanamo Bay were brought to Camp Bulkeley to begin immediate re-interviewing of the 300 refugees held there. According to INS officials, all refugees in Bulkeley are HIV positive or the children of HIV positive people.

3. On Friday, April 24, the authorities began repeated broadcasts in Camp Bulkeley. In menacing language, refugees were told that they had 24 hours to submit to a second interview, or else the American authorities could not be responsible for the consequences. The clear threat of the message was that refugees who did not consent to a second interview would be repatriated immediately. In response, members of the Association of Haitian Political Refugees (AHPR), insisted that a second interview could only be conducted in Miami or with their lawyers. AHPR pointed out that the Justice Department lawyers were present, but their own lawyers were not. An increased military presence around the camp added to the pressure, but members of AHPR resolved to stick together even if it meant dying together.

4. That same day, Friday, April 24, the government repatriated 27 refugees from Camp Bulkeley after they had signed some sort of waiver form. Some of these

refugees were among the 65 people who had been screened in and then re-interviewed, but they were not informed of the results before deciding whether to submit to repatriation.

5. On Saturday, April 25, 30 more refugees in Bulkeley were repatriated, though again, some had already had second interviews and may have been chosen to go to Miami.

6. As the repatriations continued, I sensed growing tension among the refugees and officials. On Sunday, April 26, when I visited Camp 7 to say goodbye to refugees there, I heard a refugee shouting that he was supposed to be in the prison seven days, but his sentence had been extended an additional seven days. Military Police (MPs) in riot gear went in and began to beat the man. I shouted at the MPs that he was surrendering and to stop beating him. The MPs wouldn't stop, and I threw my body between the Americans and the Haitian. The MPs pulled me away, wrenching my arm. They threw the Haitian to ground, cracking open his skull, and continued to beat him. There was blood everywhere.

7. The INS is preparing to repatriate the 102 members of AHPR at the first chance they get. They will likely repatriate them today, Tuesday, April 28. I overheard military authorities say that they planned to use force to remove these 102 people because they expect the Haitians to resist. The members of AHPR are some of the most articulate and politically active people in Bulkeley, and many, such as AHPR officers Dr. Franz Guerrier and Chery Martin, were leaders in Aristide's Lavalas movement.

8. Some "triple-backers" are now arriving on Guantanamo. I recently spoke to one, a political activist who had fled Haiti twice previously, been picked up at sea, detained, and twice repatriated, only to find that the military authorities continue to brutalize the Haitian people, and that violence pervades the nation.

9. At the current rate of repatriation, the INS will empty Camp Bulkeley well in advance of May 8, when I understand the Court of Appeals will consider this case. Camp Bulkeley holds all refugees identified by the INS as HIV positive.

I swear upon penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Jacques Fabre
JACQUES FABRE

4-28-92
Date

PROPOSED INTERDICTION OF HAITIAN FLAG VESSELS

Proposed executive agreement between the government of Haiti and the United States, by which the U.S. Coast Guard is to stop and board Haitian flag vessels on the high seas in order to prevent Haitians from entering the United States illegally, is authorized both by the U.S. immigration laws, and by the President's inherent constitutional power to protect the Nation and to conduct foreign relations.

Authority for provision in proposed agreement with Haiti, by which the Coast Guard will detain Haitians emigrating in violation of Haitian law and return them to Haiti, derives from the President's statutory power to guard the borders against illegal entry of aliens, and from his inherent constitutional power in the field of foreign relations.

August 11, 1981

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This responds to your inquiry concerning the implementation of the proposed interdiction of Haitian flag vessels. As presently formulated, the government of Haiti and the United States will enter into an agreement (the Agreement) permitting the United States Coast Guard to stop Haitian flag vessels, board them and ascertain whether any of the Haitians aboard have left Haiti in violation of its travel laws and whether they intend to travel to the United States in violation of U.S. immigration laws. Individuals who are determined to have left Haiti illegally will be returned to Haiti pursuant to the President's authority in the field of foreign relations in order to assist Haiti in the enforcement of its emigration laws. Those who have left Haiti, whether legally or illegally, in an attempt to enter the United

States illegally will be returned to Haiti pursuant to the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a)(1) to enforce U.S. immigration laws, to protect our sovereignty, and as an exercise of his power in the field of foreign relations.[1]

The Coast Guard plans to intercept the Haitian vessels in the Windward Passage, on the high seas but relatively close to Haiti.[2] At that point, Haitians will be headed toward either the United States or the Bahamas. Although experience suggests that two-thirds of the vessels are headed toward the United States, it is probable that, as the interdiction continues, an ever-increasing number will claim they are going to the Bahamas. Unless the Haitians admit they are coming to the United States, establishing their intended destination may become more difficult.

1. *Effect of the Immigration and Nationality Act (INA).* The interdiction will not be affected by the provisions of the INA. Aliens are entitled to exclusion proceedings only when they arrive "by water or by air at any port within the United States." 8 U.S.C. § 1221(a). They are entitled to deportation proceedings only if they are "within the United States." 8 U.S.C. § 1251. Asylum claims may only be filed by those "physically present in the United States or at a land border or port of entry." The Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 105 (to be codified at 8 U.S.C. § 1158(a)). Since the interdiction will be taking place on the high

[1] We note that the Agreement does not cover United States vessels either while they are in Haitian waters or while they are on the high seas. Therefore, the Agreement does not contemplate the return of the Haitians on board such vessels to Haiti.

[2] Placing the Coast Guard vessels closer to the United States is apparently not possible because of the increased difficulties and costs of detecting and interdicting vessels from Haiti once they have traveled far from Haiti and the practical problems of caring for the Haitians during the 4-day voyage back to Haiti.

seas, which is not part of the United States, 8 U.S.C. § 1101(a)(38), none of these provisions will apply.

2. *Coast Guard Authority to Enforce United States Laws.* The Coast Guard is authorized to stop ships upon the high seas in order to detect violations of American laws. 14 U.S.C. § 89(a).[3] The interdiction at seas of a foreign flag vessel requires the permission of the flag state, which the contemplated Agreement expressly grants.[4] The authority for returning the Haitians who are attempting to enter the United States illegally may be found in both statutory authority and implied consti-

[3] This section states:

> The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas . . . for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

[4] The continuing jurisdiction of a country over vessels flying its flag on the high seas is a basic principle of international law. 1 L. Oppenheim, International Law § 264 (8th ed. 1955). This principle has been codified in the Convention on the High Seas, Apr. 29, 1958, art. 6, 13 U.S.T. 2313, T.I.A.S. No. 5200. Ships flying no flag may also be stopped to determine if they are stateless.

tutional authority under Article II. The two statutes are 8 U.S.C. §§ 1182(f) and 1185(a)(1). The first, 8 U.S.C. § 1182(f), states:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or non-immigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.[5]

The second, 8 U.S.C. § 1185(a)(1), provides:

> (a) Until otherwise ordered by the President or Congress, it shall be unlawful—
>
> > (1) for any alien to . . . attempt to . . . enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe . . .

Under § 1182(f), the President would make a finding that the entry of all Haitians without proper documentation is detrimental to the interests of the United States and issue a proclamation suspending their entry. It could be argued that the entry of illegal aliens, Haitians or otherwise, is already "suspended" since it is already illegal for them to come, and that the section is directed against those who are otherwise eligible. The section, however, is not limited by its terms to documented aliens, and the legislative history is silent on this point. Since the section delegates to the President the authority to exclude entirely certain classes of aliens, we believe that

[5] Neither this Office nor the Immigration and Naturalization Service (INS) is aware of any time when the power granted by this section, added in 1952, has been used.

a return of the Haitians can be based on the Coast Guard's power to enforce federal laws. 14 U.S.C. § 89(a). Likewise, § 1185(a)(1) makes it unlawful for any alien to enter the country unless in compliance with the rules and limitations set by the President. All of the undocumented Haitians who are attempting to enter the country are therefore doing so in violation of this section. *See also* 8 U.S.C. § 1103 (Attorney General's duty to control and guard the borders); *Ex parte Siebold*, 100 U.S. 371, 396 (1879).[6]

Implied constitutional power is less clear. Where Congress has acted, the regulation of immigration is an area in which Congress exercises plenary power. *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972) (power to exclude aliens prevails over First Amendment interests of citizens). There has been recognition, however, that the sovereignty of the Nation, which is the basis of our ability to exclude all aliens, is lodged in both political branches of the government. *See Ekiu* v. *United States*, 142 U.S. 651, 659 (1892). An explicit discussion is found in *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950). Rejecting a claim that it should review regulations which excluded a German war bride, the Court stated:

> Petitioner contends that the 1941 Act and the regulations thereunder are void to the extent that they contain unconstitutional delegations of legislative power. But there is no question of inappropriate delegation of legislative power involved here. The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is *inherent in the executive power* to control the foreign affairs of the nation.

[6] Given the desperate physical condition of many of the Haitians found on the high seas, the Coast Guard may, in particular situations, also be acting pursuant to its duty to render aid to distressed persons and vessels. 14 U.S.C. §§ 2, 88.

> *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.

Id. at 542 (citations omitted, emphasis added). *See also Savelis* v. *Vlachos*, 137 F. Supp. 389, 395 (E.D. Va. 1955) *aff'd*, 248 F.2d 729 (4th Cir. 1957) (dictum).

The President, in the exercise of this inherent authority, would be acting to protect the United States from massive illegal immigration. His power to protect the Nation or American citizens or property that are threatened, even where there is no express statute for him to execute, was recognized in *In re Neagle*, 135 U.S. 1, 63-67 (1890). *See also In re Debs*, 158 U.S. 564, 581 (1895); *United States ex rel. Martinez-Angosto* v. *Mason*, 344 F.2d 673, 688 (2d Cir. 1965) (Friendly, J. concurring); 50 U.S.C. § 1541 (War Powers Resolution).[7] A recent Supreme Court decision points out that, in the absence of legislation, it was a common perception that the President could control the issuance of passports to citizens, citing the foreign relations power. *Haig* v. *Agee*, 453 U.S. 281, 292-94 (1981).

The President may also act to return the boats with the flag state's permission as an exercise of his power in the field of foreign relations, a field in which "with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation." *United States* v. *Curtiss-*

[7] This Office has relied upon such inherent authority in an opinion, stating that the President could act to prevent airplane hijackings by placing marshals on board, even in the absence of express authority to take such preventive measures. Memorandum for the Director, United States Marshals Service, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, 2-3 (Sept. 30, 1970).

Wright Export Corp., 299 U.S. 304, 319 (1936). *See also Narenji* v. *Civiletti*, 617 F.2d 745, 747-48 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980) (regulation of Iranian students); *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948) (regulation of foreign airlines). The President's power is strongest where he has well recognized constitutional powers (foreign affairs) to which Congress has added statutory delegation (8 U.S.C. §§ 1182(f), 1185).

3. *Coast Guard Authority to Enforce Haitian Law Pursuant to an Agreement Entered into by the Executive.* The Coast Guard has submitted a draft Agreement that would permit the Coast Guard to board Haitian vessels in order to determine whether any alien is committing an offense against Haitian emigration laws. The issue which arises is whether the Executive can enter into an agreement under which the United States agrees to detain Haitians who are emigrating in violation of Haitian law in order to return them to Haiti. The President's authority to enter into executive agreements with foreign nations may be exercised either under congressional authorization or the President's inherent authority.[8] The President's power to enter into such agreements on his own authority can arise from "that control of foreign relations which the Constitution vests in the President as a part of the Executive function," 39 Op. Att'y Gen. 484, 486 (1940).[9] The limits on presidential power to enter into these agreements are not settled and have aroused controversy from the earliest days of our Republic.[10]

[8] E. Corwin, The President's Control of Foreign Relations 116-17 (1917) (Corwin).

[9] Agreements executed by various Presidents for the settlement of claims of United States citizens against foreign governments are examples. *See Dames & Moore* v. *Regan*, 453 U.S. 654 (1981).

[10] E. Corwin, The President, 216-233 (3d ed. 1948) (debate between Hamilton and Madison over the constitutionality of Wash-

We believe that authority to enter into the Agreement is provided by two sources—the power delegated by Congress to the President, through the Attorney General, to guard the borders, 8 U.S.C. § 1103(a), and the President's authority in the field of foreign relations. The arrest of Haitian citizens as an aid to Haiti's enforcement of its emigration laws will enable the President to curtail the flow of Haitians in the furtherance of his "power and duty to control and guard the boundaries and the borders of the United States against the illegal entry of aliens." *Id.* The breadth of the President's authority in the field of foreign relations is extremely broad, as illustrated by the numerous executive agreements that have been negotiated and upheld by the courts.[11] *See United States* v. *Pink*, 315 U.S. 203 (1942) (Litvinov Agreement); *United States* v. *Belmont*, 301 U.S. 324 (1937) (same); *Tucker* v. *Alexandroff*, 183 U.S. 424, 435 (1902) (Mexican/United States agreement to permit both countries to cross the border in pursuit of marauding Indians);[12] *Dole* v. *Carter*, 444 F. Supp. 1065, 1068-69 (D. Kansas), *motion denied*, 569 F.2d 1109 (10th Cir. 1977) (return of the Crown of St. Stephen).

An agreement to aid the enforcement of the laws of another country is not without precedence. In 1891, the United States and Great Britain entered into an executive agreement prohibiting for one year the killing of seals in the Bering Sea. *Modus Vivendi Respecting the Fur-Seal Fisheries in Behring Sea*, 1 W. Malloy, Treaties, Conventions, International Acts, Protocols, and Agreements, 743 (1910) (Malloy). This agreement permitted the seizure of offending vessels and persons if "outside the ordinary territorial limits of the United States," by the naval authorities of either country. *Id.*, Art. III. "They shall be handed over as soon as practicable to the authorities of the nation to which they respectively belong. . . ." *Id.* As there was no statutory authority for this agreement, the President acted pursuant to his inherent authority in the field of foreign affairs.

Between 1905 and 1911, Presidents Roosevelt and Taft entered into a series of executive agreements that permitted the United States to operate the customs administration of both Santo Domingo (now the Dominican Republic) and Liberia.[13]

> [This first agreement] provided, in brief, for (1) a receiver of 'the revenues of all the customs houses,' to be designated by the President of the United States and satisfactory to the Dominican President; (2) the deposit in a New York bank for the benefit of creditors of all receipts above 45 percent, which was to be turned over to the Dominican Republic for the expenses of government administration and the necessary expenses of collection; and (3) the eventual distribution of the funds in the payment of Dominican debts.

W. McClure, International Executive Agreements 94 (1941). A customs administration in Haiti was established by treaty in 1915 but an elaborate series of executive agreements were signed "both extending and terminating various phases of American intervention and

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ington's Proclamation of Neutrality); L. Henkin, Foreign Affairs and the Constitution 177 (1972) (Henkin).

[11] Henkin, *supra*, at 179.

[12] 1 W. Malloy, Treaties, Conventions, International Acts, Protocols, and Agreements 1144 (1910) (Malloy).

[13] 1 W. Malloy, *supra*, at 418. *See also* McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements*, 54 Yale L.J. 181, 279 (1945); N. Small, Some Presidential Interpretations of the Presidency, 78-79 (1970). The arrangement was based on a fear that these countries' debts would be used by European countries as a grounds for military intervention.

assistance in the financial, medical and military affairs of Haiti." [14]

Many authorities have noted that a President's exercise of his authority in this area is "a problem of practical statemanship rather than of Constitutional Law." E. Corwin, The President's Control of Foreign Relations 120-21 (1917).[15] The Supreme Court has upheld a variety of executive agreements based upon a number of theories and it is difficult to delineate with certainty the limits of the President's authority when he enters into such agreements based solely on his inherent executive authority. *But see Reid* v. *Covert*, 354 U.S. 1, 16-19 (1957) (agreement cannot deny civilian his right to a trial by jury). Because this agreement will be based both on delegated and inherent authority, we believe that it is constitutional.

4. *Obligations Under the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, United Nations, Protocol, 19 U.S.T. 6223*, T.I.A.S. No. 6577. Article 33 (19 U.S.T 6276) of the Protocol, to which the United States is a party, provides that "No Contracting State shall . . . return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Individuals who claim that they will be persecuted for one of these reasons must be

[14] McDougal, *supra*, 54 Yale L.J. at 279. The final one was signed in 1934.

[15] Commitment of financial resources overseas "depend[s] directly and immediately on appropriations from Congress. . . . While the issue of Presidential power to make executive agreements or commitments has no legal solution, political forces have mitigated its theoretical rigors. The President has to get along with Congress and with the Senate in particular, and he will not lightly risk antagonizing it by disregarding what it believes are its constitutional prerogatives." Henkin, *supra*, at 183-84. *See also* K. Holloway, Modern Trends in Treaty Law 216-17 (1967); McClure, *supra*, at 330; Restatement (Second) of the Foreign Relations Law of the United States § 121 (1965).

given an opportunity to substantiate their claims. The Protocol does not, however, mandate any particular kind of procedure. We have reviewed the plan outlined in the draft prepared by INS and believe that it comports with the Protocol.

5. *Effect of the Foreign Assistance Act of 1961, 22 U.S.C. § 2151-2151d (Supp. III 1979).* We know of no provision of the Act that would prohibit the interdiction, since no foreign aid funds are being used.

6. *Formal Implementation of the Interdiction.* There are three formal steps still to be taken before the interdiction can begin. The first is clearance of the Agreement by the Department of State. The second is the signing of the Agreement by the United States and the government of Haiti.[16] The third is the issuance of a proclamation by the President pursuant to 8 U.S.C. § 1182(f). The proclamation would contain a finding that the entry of Haitian nationals who do not possess proper documentation for entry into the United States is detrimental to the interests of the United States. The proclamation would then suspend the entry of all such Haitian nationals. If a decision is made not to rely upon 8 U.S.C. § 1182(f), no proclamation is necessary. However, the validity of the President's action will certainly be strengthened by relying on both statutory provisions which provide support for the contemplated action.

The Coast Guard is presently under the authority of the Department of Transportation. 14 U.S.C. § 1. The Attorney General is in charge of enforcing the immigration laws. 8 U.S.C. § 1103. The Coast Guard will be enforcing both the immigration laws and the laws of Haiti pursuant to the Agreement. While a memorandum of understanding signed by the Coast Guard, INS, and the Department of State would facilitate operations, 14 U.S.C.

[16] The Agreement should be transmitted to Congress within 60 days. 1 U.S.C. § 112b(a) (Supp. III 1979).

§ 141, a presidential order to the Secretary of Transportation to have the Coast Guard act to enforce both parts of the Agreement will avoid any question about the Coast Guard's authority to act.

7. *Coast Guard's Authority to Operate in Haitian Waters:* Under the Agreement Haiti will grant the Coast Guard permission to enter its waters to return Haitian nationals. The Coast Guard's authority to enter the waters will be pursuant to the Agreement.[17] By permitting the Coast Guard to enter its waters, Haiti is granting free passage to our ships and crews. Sovereign nations often grant permission for the passage of foreign forces. *Tucker* v. *Alexandroff*, 183 U.S. 424, 435 (1902); *Schooner Exchange* v. *McFaddon*, 11 U.S. 116, 139-40 (1812); 2 J. Moore, A Digest of International Law § 213 (1906). We suggest a modification to the Agreement to make it clear that Haiti will not exercise jurisdiction over the Coast Guard ships or her crews while they are in Haitian waters. *Schooner Exchange*, 11 U.S. at 140, 143.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[17] It will not be pursuant to 14 U.S.C. § 89(a) because the waters of Haiti are not within the jurisdiction of the United States. *United States* v. *Conroy*, 589 F.2d 1258, 1265 (5th Cir. 1979). Section 89(a), however, does not limit the authority of the Coast Guard to act pursuant to another provision of law—in this case, the Agreement. 14 U.S.C. § 89(c).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

AFFIRMATION OF HAROLD HONGJU KOH IN SUPPORT OF PLAINTIFFS' ORDER TO SHOW CAUSE WHY A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION SHOULD NOT BE GRANTED

Harold Hongju Koh, under penalty of perjury, hereby affirms:

1. I am one of the attorneys for the plaintiffs in the above-entitled case and make this affirmation in support of plaintiffs' order to show cause why a temporary restraining order (TRO) and preliminary injunction should not be granted.

2. Plaintiffs seek an emergency TRO based on legal grounds not yet ruled upon by any court and based on facts warranting immediate judicial relief.

3. Article 33 of the United Nations Protocol Relating to the Status of Refugees, 606 U.N.T.S., 19 U.S.T. 6223, T.I.A.S. No. 6577, which became United States law upon ratification on November 1, 1968, provides that "No Contracting State shall expel or return (*"refouler"*) a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" (emphasis added).

4. In 1980, Congress reaffirmed that self-executing obligation by enacting 8 U.S.C. § 1253(h)(1) Appendix F, which mandates that the "Attorney General shall not deport *or return* any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened on account of his race, religion, nationality,

membership in a particular social group, or political opinion" (emphasis added).

5. In the U.S.-Haiti Executive Agreement, T.I.A.S. 10,241, signed on September 23, 1981, the Government of Haiti "agree[d] to permit upon prior notification the return of detained vessels and persons to a Haitian port," but did so "[h]aving regard to . . . the international obligations mandated in the Protocol Relating to the Status of Refugees done at New York 31 January 1967 . . ." and on the express understanding "that under these arrangements the United States Government does not intend to return to Haiti *any* Haitian migrants whom the United States authorities determine to qualify for refugee status" (emphasis added).

6. These binding legal obligations compelled President Reagan to include in Executive Order No. 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1981), reprinted in 8 U.S.C.A. § 1182 Note (1982) Appendix B, at

> a) Sections 2(c)(3), which requires "that no person who is a refugee will be returned [to Haiti by the Coast Guard] without his consent," and
>
> b) Section 3, which mandates that the "Attorney General shall, in consultaton with the Secretary of State and the Secretary of the Department in which the Coast Guard is operating, take whatever steps are necessary to ensure the fair enforcement of our laws relating to immigration . . . and the *strict observance of our international obligations concerning those who genuinely flee persecution in their homeland.*" Sec. 3 (emphasis added).

That Executive Order by its own terms applied "only outside the territorial waters of the United States," demonstrating the applicability of Article 33 of the Protocol to the high seas by the Executive's own admission.

Only one month before that Executive Order issued, the Justice Department's own legal counsel construed our

obligations under the 1967 U.N. Protocol Relating to the Status of Refugees as requiring that "[i]ndividuals who claim that they will be persecuted . . . *must be given an opportunity to substantiate their claims.*" 5 Op. Off. Legal Counsel 242, 248 (1981) (emphasis added). (Appendix I)

7. Invoking presidential authority and sections 212(f) and 215(a)(1) of the INA, Appendix D and Appendix E, respectively, the Order issued on May 24, 1992 (May 24th Order) simply dispensed with these binding legal obligations, instead purporting:

> (a) to authorize defendants Coast Guard Commandants and INS summarily and forcibly return *bona fide* refugees without any semblance of process to conditions of persecution and death in Haiti, sec. 3;
>
> (b) to grant defendant Attorney General unreviewable discretion to deny Haitians access to the U.S. asylum program, without any "screening" procedures whatsover, sec. 2(c)(3); and
>
> (c) to revoke and replace Executive Order No. 12,324, sec. 4.

8. Citing the May 24th Order, defendants are currently interdicting and repatriating Haitians to Haiti without any screening whatsoever, in total disregard of their fears of political persecution. Defendants repatriated 38 Haitians on May 26, under this new, lawless policy. Prior to the May 24th Order, defendants were screening in over 30% of all interdicted Haitians for asylum assessments, most eventually in the United States. Deposition of Scott Busby, P.E. 88. As a result of the new Order, no Haitians are now being screened in, and hundreds if not thousands of Haitians who genuinely fear persecution in Haiti are being and will be returned.

9. In its preliminary injunction opinion of April 6, 1992, at 31, this Court certified under Fed. R. Civ. P.

23(b)(2) the class of screened-in plaintiffs, a class that includes "[a]ll Haitian citizens who have been or *will be* '*screened-in*'" (emphasis added). This Court further found that those Haitian refugees with a "'credible' fear" of persecution upon return are screened-in. PI Op. at 8. It is as yet unclear whether defendants will read the Executitve Order to allow them to repatriate, without screening, those several thousand currently unscreened Haitians being held on Guantanamo, including all those among them who in fact have credible fears of persecution.

10. During the court-ordered visit of plaintiffs' counsel to Guantanamo on March 30-31, 1992, pursuant to the TRO of March 27, plaintiffs' counsel met and counseled two particular screened-in clients, one of them a named plaintiff identified for his own safety by the pseudonym "M. Bertrand," who were subsequently repatriated to Haiti despite having been screened in. As the attached declarations of Ronald Aubourg, P.E. 87, and Robert Rubin, P.E. 84, indicate, these two screened-in plaintiffs have been specifically deterred from asserting their claim to asylum in the United States or elsewhere by defendants' new policy. Moreover, these repatriated plaintiff class members believe that it would be "suicide" for them to seek asylum through the U.S. Embassy in Port-au-Prince, as defendants now propose. *See* Declaration of Ronald Aubourg, P.E. 87.

11. In its preliminary injunction opinion of April 6, 1992, this Court specifically made the following findings, which conclusively establish plaintiffs' irreparable injury:

> ► "In the wake of the overthrow [of President Aristide], hundreds of Haitians have been killed, tortured, detained without a warrant, or subjected to violence and the destruction of their property because of their political beliefs. Thousands have been forced into hiding." Findings of Fact, ¶ 6.

> ► "Repatriated Haitians face political persecution and even death on their return to Haiti." Findings of Fact, ¶ 24.
>
> ► "The Screened In Plaintiffs may face torture [or] death if they lack access to counsel, fail in their bid to receive asylum, and are repatriated to Haiti." Conclusion of Law, ¶ 12.

12. The attached declarations set forth the following additional facts that confirm plaintiffs' irreparable injury:

> a) The human rights condition in Haiti is terrible and has deteriorated in recent months. Declaration of Ronald Aubourg, P.E. 87; P.E. 92 (*New York Times* account).
>
> b) Members of the plaintiff class that were forcibly repatriated to Haiti because they refused to undergo final determinations of their asylum claims without an attorney have been subjected to abuse and torture upon return and are currently in hiding because they fear torture or even death. Declarations of William O'Neill, P.E. 86; Ronald Aubourg, P.E. 87; Elliot Schrage (I), P.E. 85; Elliot Schrage (II), P.E. 94; and Robert Rubin, P.E. 84.
>
> c) While the Government offers to process refugee claims at the U.S. Embassy in Port-au-Prince, *see* White House Press Release of May 24, Pl. Appendix A, it would be "suicide" for these plaintiff class members who have been repatriated to seek asylum through the U.S. Embassy. Declaration of Ronald Aubourg, P.E. 87; *see also* Declarations of William O'Neill, P.E. 86; Elliot Schrage(II), P.E. 94, and Robert Rubin, P.E. 84.

13. The overseas refugee processing program, which the Government points to as an alternative for interdicted Haitians to asserting an asylum claim when they are detained by the Coast Guard, contains regional quotas for

refugee admissions. The quota of 3,000 for the Caribbean and Latin America this year would be quickly exhausted if the number of Haitians driven to flee Haiti by boat were to resort to the Embassy and there receive a fair evaluation of the merits of their individual claims for refugee status.

14. The overseas refugee processing program, which under the INA ought to involve non-adversarial screening and evaluation of the applicant, is being conducted by the Embassy staff in Port-au-Prince in an adversarial manner. Declaration of William O'Neill, P.E. 86 ¶ 5 (all three Haitians interviewed by the Lawyers Committee delegation who had applied for refugee status through the Embassy reported that their interviews were "interrogations, adversarial and unfriendly processes in which they were pumped for information about ousted President Jean Bertrand Aristide and his supporters").

15. The May 24th Order provides no legal authority for defendants' actions because:

a) Sections 2(c)(3) and 3 of the May 24th Order purport to delegate authority to lower executive officials that far exceeds the scope of the powers granted by Congress to the Executive pursuant to sections 212(f) and 215(a)(1) of the INA and are not authorized by any statutory or constitutional presidential authority;

b) Sections 2(c)(3) and 3 of the May 24th Order violate defendants' binding domestic legal obligations under, *inter alia*, Article 33 of the UN Protocol Relating to the Status of Refugees, the U.S.-Haiti Executive Agreement, and the Immigration and Nationality Act not to forcibly return refugees found to have a credible fear of political persecution;

c) Defendants' *ultar vires* and unlawful actions are arbitrary and capricious, an abuse of discretion, and not in accordance with law in violation of the Administrative Procedure Act (APA);

d) Defendants' actions deny plaintiffs the equal protection of the laws, in violation of the Fifth Amendment of the United States Constitution.

16. Plaintiffs ask this Court to:

(a) *find sufficiently serious questions going to the merits to make them a fair ground for litigation* that Sections 2(c)(3) and 3 of the purported Executive Order issued on May 24, 1992 were issued without legal authority, thus rendering the entire Order null and void;

(b) *to restrain defendants, pending a hearing on plaintiffs' motion for a preliminary injunction, from repatriating*, under the purported authority of the May 24th Order, any interdicted Haitian to Haiti whose life or freedom would be threatened on account of his or her race, religion, nationality, membership in a particular social group or political opinion.

17. The balance of hardships tips decidedly in plaintiffs' favor. The relief requested would impose minimal burdens on defendants, by restoring the *status quo*, as it existed from the Haitian coup in September 1991 until May 24, 1992. Moreover, the relief requested would only hold defendants to representations that they previously made to this Court and the Supreme Court. In February, 1992, defendants assured the Supreme Court that they would repatriate screened-in refugees only after *formal asylum proceedings, with lawyers, in the United States*. They subsequently argued to this Court that such refugees could be repatriated after *de facto* asylum proceedings without lawyers on Guantanamo. Never before did defendants claim an unreviewable power to repatriate thousands of detained Haitians with credible fears of persecution without any asylum process or counsel whatsoever. In any event, the only "injury" to which defendants can point is the increased economic cost of conduct-

ing a lawful and authorized interdiction and repatriation program, pecuniary harm that cannot justify denial of relief. *See, e.g., Federation of Japan Salmon Fisheries Coop. Ass'n v. Baldridge*, 679 F. Supp. 37, 48 (D.D.C. 1987).

18. Plaintiffs are proceeding by Order to Show Cause because of the grave urgency of the situation and daily irreparable injury to their clients. Should the Court desire, plaintiffs are prepared to file supplemental pleadings under Fed. R. Civ. P. 15(d) "setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented."

19. For the reasons stated above, plaintiffs request the emergency relief enumerated in paragraph 16 of this affirmation.

20. No other request for this relief has been made to any other judge of this Court.

/s/ Harold Hongju Koh
HAROLD HONGJU KOH

Dated: May 28, 1992
New Haven, Connecticut

THE WHITE HOUSE

Office of the Press Secretary
(Kennebunkport, Maine)

For Immediate Release May 24, 1992

President Bush has issued an executive order which will permit the U.S. Coast Guard to begin returning Haitians picked up at sea directly to Haiti. This action follows a large surge in Haitian boat people seeking to enter the United States and is necessary to protect the lives of the Haitians, whose boats are not equipped for the 600-mile sea journey.

The large number of Haitian migrants has led to a dangerous and unmanageable situation. Both the temporary processing facility at the U.S. Naval base Guantanamo and the Coast Guard cutters on patrol are filled to capacity. The President's action will also allow continued orderly processing of more than 12,000 Haitians presently at Guantanamo.

Through broadcasts on the Voice of America and public statements in the Haitian media we continue to urge Haitians not to attempt the dangerous sea journey to the United States. Last week alone eighteen Haitians perished when their vessel capsized off the Cuban coast.

Under current circumstances, the safety of Haitians is best assured by remaining in their country. We urge any Haitians who fear persecution to avail themselves of our refugee processing service at our Embassy in Port-au-Prince. The Embassy has been processing refugee claims since February. We utilize this special procedure in only four countries in the world. We are prepared to increase the American embassy staff in Haiti for refugee processing if necessary.

The United States Coast Guard has picked up over 34,000 since the coup in Haiti last September 30. Senior

U.S. officials are seeking the assistance of other countries and the United Nations to help deal with the plight of Haitian boat people, and we will continue our intensive efforts to find alternative solutions to avoid further tragedies on the high seas.

The President has also directed an intensification of our ongoing humanitarian assistance efforts in Haiti. Our current programs total 47 million dollars and provide food for over 600,000 Haitians and health care services which reach nearly two million. We hope other nations will also increase their humanitarian assistance as called for in the resolution on Haiti passed by the OAS Foreign Ministers on May 17.

STATUTORY PROVISIONS INVOLVED

1. The Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, provides:

CHAPTER 7. JUDICIAL REVIEW

§ 701. Application; definitions

(a) This chapter [5 USCS §§ 701 et seq.] applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter [5 USCS §§ 701 et seq.]—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the terriories or possesions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41

[41 USCS §§ 101 et seq.]; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix, and

(2) "person," "rule," "order," "license," "sanction," "relief," and "agency action" have the meanings given them by section 551 of this title.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

2. Relevant provisions of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*

a. Section 101 of the Act, as codified at 8 U.S.C. 1101, provides in pertinent part:

SUBCHAPTER I—GENERAL PROVISIONS

§ 1101. Definitions

(a) As used in this chapter—

* * * * *

(3) The term "alien" means any person not a citizen or national of the United States.

* * * * *

(17) The term "immigration laws" includes this chapter and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, deportion, or expulsion of aliens.

(38) The term "United States", except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.

* * * * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the

case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

* * * * *

b. Section 207 of the Immigration and Nationality Act, as codified at 8 U.S.C. 1157 (& Supp. II 1990), provides:

§ 1105a. Judicial review of orders of deportation and exclusion

(a) Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, except that—

(1) Time for filing petition

a petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order, or, in the case of an alien convicted of an aggravated felony, not later than 30 days after the issuance of such order;

(2) Venue

the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry

officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this chapter, of the petitioner, but not in more than one circuit;

(3) Respondent; service of petition; stay of deportation

the action shall be brought against the Immigration and Naturalization Service, as respondent. Service of the petition to review shall be made upon the Attorney General of the United States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs or unless the alien is convicted of an aggravated felony, in which case the Service shall not stay the deportation of the alien pending determination of the petition of the court unless the court otherwise directs;

(4) Determination upon administrative record

except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

(5) Claim of nationality; determination or transfer to district court for hearing de novo

whenever any petitioner, who seeks review of an order under this section, claims to be a national of

the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28. Any such petitioner shall not be entitled to have such issue determined under section 1503(a) of this title or otherwise;

(6) Consolidation

whenever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order;

(7) Challenge of validity of deportation order in criminal proceeding; motion for judicial review before trial; hearing de novo on nationality claim; determination of motion; dismissal of indictment upon invalidity of order; appeal

if the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 1252 of this title only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before the trial of the general issue. Whenever a claim to United States nationality is made in such motion, and in the opinion

of the court, a genuine issue of material fact as to the alien's nationality is presented, the court shall accord him a hearing de novo on the nationality claim and determine that issue as if proceedings had been initiated under the provisions of section 2201 of title 28. Any such alien shall not be entitled to have such issue determined under section 1503(a) of this title or otherwise. If no such hearing de novo as to nationality is conducted, the determination shall be made solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive. If the deportation order is held invalid, the court shall dismiss the indictment and the United States shall have the right to appeal to the court of appeals within thirty days. The procedure on such appeals shall be as provided in the Federal rules of criminal procedure. No petition for review under this section may be filed by any alien during the pendency of a criminal proceeding against such alien for violation of subsection (d) or (e) of section 1252 of this title;

(8) Deferment of deportation; compliance of alien with other provisions of law; detention or taking into custody of alien

nothing in this section shall be construed to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section, or to relieve any alien from compliance with subsections (d) and (e) of section 1252 of this title. Nothing contained in this section shall be construed to preclude the Attorney General from detaining or continuing to detain an alien or from taking

him into custody pursuant to subsection (c) of section 1252 of this title at any time after the issuance of a deportation order;

(9) Typewritten record and briefs

it shall not be necessary to print the record or any part thereof, or the briefs, and the court shall review the proceedings on a typewritten record and on typewritten briefs; and

(10) Habeas corpus

any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

(b) Limitation of certain aliens to habeas corpus proceedings

Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 1226 of this title or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

(c) Exhaustion of administrative remedies or departure from United States; disclosure of prior judicial proceedings

An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the na-

ture and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

c. Section 207 of the Immigration and Nationality Act, as codified at 8 U.S.C. 1157 (& Supp. II 1990), provides:

§ 1157. Annual admission of refugees and admission of emergency situation refugees

(a) Maximum number of admissions; increases for humanitarian concerns; allocations

(1) Except as provided in subsection (b) of this section, the number of refugees who may be admitted under this section in fiscal year 1980, 1981, or 1982, may not exceed fifty thousand unless the President determines, before the beginning of the fiscal year and after appropriate consultation (as defined in subsection (e) of this section), that admission of a specific number of refugees in excess of such number is justified by humanitarian concerns or is otherwise in the national interest.

(2) Except as provided in subsection (b) of this section, the number of refugees who may be admitted under this section in any fiscal year after fiscal year 1982 shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultration, is justified by humanitarian concerns or is otherwise in the national interest.

(3) Admissions under this subsection shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after appropriate consultation.

(4) In the determination made under this subsection for each fiscal year (beginning with fiscal year 1992), the President shall enumerate, with the respective number of refugees so determined, the number of aliens who were granted asylum in the previous year.

(b) Determinations by President respecting number of admissions for humanitarian concerns

If the President determines, after appropriate consultation, that (1) an unforeseen emergency refugee situation exists, (2) the admission of certain refugees in response to the emergency refugee situation is justified by grave humanitarian concerns or is otherwise in the national interest, and (3) the admission to the United States of these refugees cannot be accomplished under subsection (a) of this section, the President may fix a number of refugees to be admitted to the United States during the succeeding period (not to exceed twelve months) in response to the emergency refugee situation and such admissions shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after the appropriate consultation provided under this subsection.

(c) Admission by Attorney General of refugees; criteria; admission status of spouse or child; applicability of other statutory requirements; termination of refugee status of alien, spouse or child

(1) Subject to the numerical limitations established pursuant to subsections (a) and (b) of this section, the Attorney General may, in the Attorney General's discretion and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this chapter.

(2) A spouse or child (as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title) of any refugee who qualifies for admission under paragraph (1) shall, if not otherwise entitled to admission under paragraph (1) and if not a person described in the second sentence of section 1101(a)(42) of this title, be entitled to the same admission status as such refugee if accompanying, or following to join, such refugee and if the spouse or child is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this chapter. Upon the spouse's or child's admission to the United States, such admission shall be charged against the numerical limitation established in accordance with the appropriate subsection under which the refugee's admission is charged.

(3) The provisions of paragraphs (4), (5), and (7)(A) of section 1182(a) of this title shall not be applicable to any alien seeking admission to the United States under this subsection, and the Attorney General may waive any other provision of such section (other than paragraph (2)(C) or subparagraphs[1] (A), (B), (C), or (E) of paragraph (3)) with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. Any such waiver by the Attorney General shall be in writing and shall be granted only on an individual basis following an investigation. The Attorney General shall provide for the annual reporting to Congress of the number of waivers granted under this paragraph in the previous fiscal year and a summary of the reasons for granting such waivers.

(4) The refugee status of any alien (and of the spouse or child of the alien) may be terminated by the Attorney General pursuant to such regulations as the Attorney General may prescribe if the Attorney General determines that the alien was not in fact a refugee within the meaning of section 1101(a)(42) of this title at the time of the alien's admission.

(d) Oversight reporting and consultation requirements

(1) Before the start of each fiscal year the President shall report to the Committees on the Judiciary of the House of Representatives and of the Senate regarding the foreseeable number of refugees who will be in need of resettlement during the fiscal year and the anticipated allocation of refugee admissions during the fiscal year. The President shall provide for periodic discussions between designated representatives of the President and members of such committees regarding changes in the worldwide refugee situation, the progress of refugee admissions, and the possible need for adjustments in the allocation of admissions among refugees.

(2) As soon as possible after representatives of the President initiate appropriate consultation with respect to the number of refugee admissions under subsection (a) of this section or with respect to the admission of refugees in response to an emergency refugee situation under subsection (b) of this section, the Committees on the Judiciary of the House of Representatives and of the Senate shall cause to have printed in the Congressional Record the substance of such consultation.

(3)(A) After the President initiates appropriate consultation prior to making a determination under subsection (a) of this section, a hearing to review the proposed determination shall be held unless public disclosure of the details of the proposal would jeopardize the lives or safety of individuals.

(B) After the President initiates appropriate consultation prior to making a determination, under subsection (b) of this section, that the number of refugee admissions should be increased because of an unforeseen emergency refugee situation, to the extent that time and the nature of the emergency refugee situation permit, a hearing to review the proposal to increase refugee admissions shall be held unless public disclosure of the details

of the proposal would jeopardize the lives or safety of individuals.

(e) "Appropriate consultation" defined

For purposes of this section, the term "appropriate consultation" means, with respect to the admission of refugees and allocation of refugee admissions, discussions in person by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives to review the refugee situation or emergency refugee situation, to project the extent of possible participation of the United States therein, to discuss the reasons for believing that the proposed admission of refugees is justified by humanitarian concerns or grave humanitarian concerns or is otherwise in the national interest, and to provide such members with the following information:

(1) A description of the nature of the refugee situation.

(2) A description of the number and allocation of the refugees to be admitted and an analysis of conditions within the countries from which they came.

(3) A description of the proposed plans for their movement and resettlement and the estimated cost of their movement and resettlement.

(4) An analysis of the anticipated social, economic, and demographic impact of their admission to the United States.

(5) A description of the extent to which other countries will admit and assist in the resettlement of such refugees.

(6) An analysis of the impact of the participation of the United States in the resettlement of such refugees on the foreign policy interests of the United States.

(7) Such additional information as may be appropriate or requested by such members.

To the extent possible, information described in this subsection shall be provided at least two weeks in advance of discussions in person by designated representatives of the President with such members.

d. Section 208 of the Immigration and Nationality Act, as codified at 8 U.S.C. 1158 (& Supp. II 1990), provides:

§ 1158. Asylum procedure

(a) Establishment by Attorney General; coverage

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(b) Termination of asylum by Attorney General; criteria

Asylum granted under subsection (a) of this section may be terminated if the Attorney General, pursuant to such regulations as the Attorney General may prescribe, determines that the alien is no longer a refugee within the meaning of section 1101(a)(42)(A) of this title owing to a change in circumstances in the alien's country of nationality or, in the case of an alien having no nationality, in the country in which the alien last habitually resided.

(c) Status of spouse or child or alien granted asylum

A spouse or child (as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title) of an alien

who is granted asylum under subsection (a) of this section may, if not otherwise eligible for asylum under such subsection, be granted the same status as the alien if accompanying, or following to join, such alien.

(d) Aliens convicted of aggravated felony

An alien who has been convicted of an aggravated felony, notwithstanding subsection (a) of this section, may not apply for or be granted asylum.

e. Section 212(f) of the Immigration and Nationality Act, as codified at 8 U.S.C. 1182(f), provides:

§ 1182. Excludable aliens

* * * * *

(f) Suspension of entry or imposition of restrictions by President

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrant or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

f. Section 215(a) of the Immigration and Nationality Act, as codified at 8 U.S.C. 1185(a), provides:

§ 1185. Travel control of citizens and aliens

(a) Restrictions and prohibitions

Unless otherwise ordered by the President, it shall be unlawful—

(1) for any alien to depart from or enter or attempt to depart from or enter the United States

except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

(2) for any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this section;

(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(4) for any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence of permission to depart or enter not issued and designed for such other person's use;

(5) for any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(6) for any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(7) for any person knowingly to use or attempt to use or furnish to another for any false, forged, counterfeited, mutilated, or altered permit, or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid.

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g. Section 235 of the Immigration and Nationality Act, as codified at 8 U.S.C. 1225 (& Supp. II 1990), provides:

§ 1225. Inspection by immigration officers

(a) Powers of officers

The inspection, other than the physical and mental examination, of aliens (including alien crewmen) seeking admission or readmission to or the privilege of passing through the United States shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe. Immigration officers are authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence. Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any

of the excluded classes enumerated in section 1182 of this title. The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

(b) Detention for further inquiry; challenge of favorable decision

Every alien (other than an alien crewman), and except as otherwise provided in subsection (c) of this section and in section 1323(d) of this title, who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer. The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien, whose privilege to land is so challenged, before a special inquiry officer for further inquiry.

(c) Temporary exclusion; permanent exclusion by Attorney General

Any alien (including an alien crewman) who may appear to the examining immigration officer or to the special inquiry officer during the examination before either of such officers to be excludable under subparagraph (A) (other than clause (ii)), (B), or (C) of section 1182(a)(3) of this title shall be temporarily excluded, and no further inquiry by a special inquiry officer shall be conducted until after the case is reported to the Attorney General together with any such written statement and accompanying information, if any, as the alien or his representative may desire to submit in connection therewith and such an inquiry or further inquiry is directed by the Attorney General. If the Attorney General is satisfied that the alien is excludable under any of such paragraphs on the basis of information of a confidential nature, the disclosure of which the Attorney General, in the exercise of his discretion, and after consultation with the appropriate security agencies of the Government, concludes would be prejudicial to the public interest, safety, or security, he may in his discretion order such alien to be excluded and deported without any inquiry or further inquiry by a special inquiry officer. Nothing in this subsection shall be regarded as requiring an inquiry before a special inquiry officer in the case of an alien crewman.

h. Section 236 of the Immigration and Nationality Act, as codified at 8 U.S.C. 1126 (& Supp. II 1990), provides:

§ 1226. Exclusion of aliens

(a) Proceedings

A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses. He shall have authority in any case

to determine whether an arriving alien who has been detained for further inquiry under section 1225 of this title shall be allowed to enter or shall be excluded and deported. The determination of such special inquiry officer shall be based only on the evidence produced at the inquiry. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer under this section shall be conducted in accordance with this section, the applicable provisions of sections 1225 and 1357(b) of this title, and such regulations as the Attorney General shall prescribe, and shall be the sole and exclusive procedure for determining admissibility of a person to the United States, under the provisions of this section. At such inquiry, which shall be kept separate and apart from the public, the alien may have one friend or relative present, under such conditions as may be prescribed by the Attorney General. A complete record of the proceedings and of all testimony and evidence produced at such inquiry, shall be kept.

(b) Appeal

From a decision of a special inquiry officer excluding an alien, such alien may take a timely appeal to the Attorney General, and any such alien shall be advised of his right to take such appeal. No appeal may be taken from a temporary exclusion under section 1225(c) of this title. From a decision of the special inquiry officer to admit an alien, the immigration officer in charge at the port where the inquiry is held may take a timely appeal to the Attorney General. An appeal by the alien, or such officer in charge, shall operate to stay any final action with respect to any alien whose case is so appealed until the final decision of the Attorney General is made. Except as

provided in section 1225(c) of this title such decision shall be rendered solely upon the evidence adduced before the special inquiry officer.

(c) Finality of decision of special inquiry officers

Except as provided in subsections (b) or (d) of this section, in every case where an alien is excluded from admission into the United States, under this chapter or any other law or treaty now existing or hereafter made, the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General.

(d) Physical and mental defects

If a medical officer or civil surgeon or board or medical officers has certified under section 1224 of this title that an alien has a disease, illness, or addiction which would make the alien excludable under paragraph (1) of section 1182(a) of this title, the decision of the special inquiry officer shall be based solely upon such certification. No alien shall have a right to appeal from such an excluding decision of a special inquiry officer.

(e) Custody of alien

(1) Pending a determination of excludability, the Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction.

(2) Notwithstanding any other provision of this section, the Attorney General shall not release such felon from custody unless the Attorney General determines that the alien may not be deported because the condition described in section 1253(g) of this title exists.

(3) If a determination described in paragraph (2) has been made, the Attorney General may release such alien only after—

(A) a procedure for review of each request for relief under this subsection has been established,

(B) such procedure includes consideration of the severity of the felony committed by the alien, and

(C) the review concludes that the alien will not pose a danger to the safety of other persons or to property.

i. Section 241 of the Immigration and Nationality Act, as codified at 8 U.S.C. 1251 (& Supp. II 1990) provide in relevant part:

PART V—DEPORTATION; ADJUSTMENT OF STATUS

§ 1251. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in the United States shall, upon the order of the Attorney General, be deported if the alien is deportable as being within one or more of the following classes of aliens:

(1) Excludable at time of entry or of adjustment of status or violates status

(A) Excludable aliens

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens excludable by the law existing at such time is deportable.

(B) Entered without inspection

Any alien who entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or any other law of the United States is deportable.

* * * * *

j. Section 242 of the Immigration and Nationality Act, as codified at 8 U.S.C. 1252 (& Supp. II 1990), provides:

§ 1252. Apprehension and deportation of aliens

(a) Arrest and custody; review of determination by court; aliens committing aggravated felonies; report to Congressional committees

(1) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Except as provided in paragraph (2), any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

(2)(A) The Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release

is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense). Notwithstanding paragraph (1) or subsections (c) and (d) of this section but subject to subparagraph (B), the Attorney General shall not release such felon from custody.

(B) The Attorney General shall release from custody an alien who is lawfully admitted for permanent residence on bond or such other conditions as the Attorney General may prescribe if the Attorney General determines that the alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.

(3) (A) The Attorney General shall devise and implement a system—

(i) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(ii) to designate and train officers and employees of the Service within each district to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(iii) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony and who have been deported; such record shall be made available to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any such previously deported alien seeking to reenter the United States.

(B) The Attorney General shall submit reports to the Committees on the Judiciary of the House of Representatives and of the Senate at the end of the 6-month period

and at the end of the 18-month period beginning on the effective date of this paragraph which describe in detail specific efforts made by the Attorney General to implement this paragraph.

(b) Proceedings to determine deportability; removal expenses

A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such

proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements consistent with section 1252b of this title. The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this chapter, or of any other law or treaty, the decision of the Attorney General shall be final. In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 1251 of this title if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraph (2), (3), or (4) of section 1251(a) of this title. If any alien who is authorized to depart voluntarily under the preceding sentence is financially unable to depart at his own expense and the Attorney General deems his removal to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this chapter.

(c) Final order of deportation; place of detention

When a final order of deportation under administrative processes is made against any alien, the Attorney

General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section. The Attorney General is authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain under this section. Where no Federal buildings are available or buildings adapted or suitably located for the purpose are available for rental, the Attorney General is authorized, notwithstanding section 5 of title 41 or section 278a of title 40 to expend, from the appropriation provided for the administration and enforcement of the immigration laws, such amounts as may be necessary for the acquisition of land and the erection, acquisition, maintenance, operation, remodeling, or repair of buildings, sheds, and office quarters (including living quarters for officers where none are otherwise available), and adjunct facilities, necessary for the de-

tention of aliens. For the purposes of this section an order of deportation heretofore or hereafter entered against an alien in legal detention or confinement, other than under an immigration process, shall be considered as being made as of the moment he is released from such detention or confinement, and not prior thereto.

(d) Supervision of deportable alien; violation by alien

Any alien, against whom a final order of deportation as defined in subsection (c) of this section heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both.

(e) Penalty for willful failure to depart; suspension of sentence

Any alien against whom a final order of deportation is outstanding by reason of being a member of any of the

classes described in paragraph (2), (3) or (4) of section 1251(a) of this title, who shall willfully fail or refuse to depart from the United States within a period of six months from the date of the final order of deportation under administrative processes, or, if judicial review is had, then from the date of the final order of the court, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years: *Provided*, That this subsection shall not make it illegal for any alien to take any proper steps for the purpose of securing cancellation of or exemption from such order of deportation or for the purpose of securing his release from incarceration or custody: *Provided further*, That the court may for good cause suspend the sentence of such alien and order his release under such conditions as the court may prescribe. In determining whether good cause has been shown to justify releasing the alien, the court shall take into account such factors as (1) the age, health, and period of detention of the alien; (2) the effect of the alien's release upon the national security and public peace or safety; (3) the likelihood of the alien's resuming or following a course of conduct which made or would make him deportable; (4) the character of the efforts made by such alien himself and by representatives of the country or countries to which his deportation is directed to expedite the alien's departure from the United States; (5) the reason for the inability of the Government of the United States to secure passports, other travel documents, or deportation facilities

from the country or countries to which the alien has been ordered deported; and (6) the eligibility of the alien for discretionary relief under the immigration laws.

(f) Unlawful reentry

Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952, on any ground described in any of the paragraphs enumerated in subsection (e) of this section, the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) of this section the date on which the finding is made that such reinstatement is appropriate shall be deemed the date of the final order of deportation.

(g) Voluntary deportation; payment of expenses

If any alien, subject to supervision or detention under subsections (c) or (d) of this section, is able to depart from the United States under the order of deportation, except that he is financially unable to pay his passage, the Attorney General may in his discretion permit such alien to depart voluntarily, and the expense of such passage to the country to which he is destined may be paid from the appropriation for the enforcement of this chapter, unless such payment is otherwise provided for under this chapter.

(h) Service of prison sentence prior to deportation

An alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated by the release of the alien from confinement. Parole, supervised release, probation, or possibility of rearrest or further confinement in respect of the same offense shall not be a ground for deferral of deportation.

(i) Expeditious deportation of convicted aliens

In the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General shall begin any deportation proceeding as expeditiously as possible after the date of the conviction.

k. Section 243 of the Immigration and Nationality Act, as codified at 8 U.S.C. 1253 (& Supp. II 1990), provides:

§ 1253. Countries to which aliens shall be deported

(a) Acceptance by designated country; deportation upon nonacceptance by country. The deportation of an alien in the United States provided for in this Act, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject, national, or

citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

(1) to the country from which such alien last entered the United States;

(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

(3) to the country in which he was born;

(4) to the country in which the place of his birth is situated at the time he is ordered deported;

(5) to any country in which he resided prior to entering the country from which he entered the United States;

(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or

(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

(b) Deportation during war. If the United States is at war and the deportation, in accordance with the provisions of subsection (a), of any alien who is deportable under any law of the United States shall be found by the Attorney General to be impracticable, inadvisable, inconvenient,

or impossible because of enemy occupation of the country from which such alien came or wherein is located the foreign port at which he embarked for the United States or because of reasons connected with the war, such alien may, in the discretion of the Attorney General, be deported as follows:

(1) if such alien is a citizen or subject of a country whose recognized government is in exile, to the country in which is located that government in exile if that country will permit him to enter its territory; or

(2) if such alien is a citizen or subject of a country whose recognized government is not in exile, then to a country or any political or territorial subdivision thereof which is proximate to the country of which the alien is a citizen or subject, or, with the consent of the country of which the alien is a citizen or subject, to any other country.

(c) Payment of deportation costs; within five years. If deportation proceedings are instituted at any time within five years after the entry of the alien for causes existing prior to or at the time of entry, the cost of removal to the port of deportation shall be at the expense of the appropriation for the enforcement of this Act, and the deportation from such port shall be at the expense of the owner or owners of the vessels, aircraft, or other transportation lines by which such alien came to the United States, or if in the opinion of the Attorney General that is not practicable, at the expense of the appropriation for the enforcement of this Act: Provided, That the costs of the deportation of any such alien from such port shall not be assessed against the owner or owners of the vessels, aircraft, or other transportation lines in the case of any alien who arrived in possession of a valid unexpired immigrant visa and who was inspected and admitted to the United States for permanent residence. In the case

of an alien crewman, if deportation proceedings are instituted at any time within five years after the granting of the last conditional permit to land temporarily under the provisions of section 252 [8 USCS § 1282], the cost of removal to the port of deportation shall be at the expense of the appropriation for the enforcement of this Act and the deportation from such port shall be at the expense of the owner or owners of the vessels or aircraft by which such alien came to the United States, or if in the opinion of the Attorney General that is not practicable, at the expense of the appropriation for the enforcement of this Act.

(d) Cost of deportation, subsequent to five years. If deportation proceedings are instituted later than five years after the entry of the alien, or in the case of an alien crewman later than five years after the granting of the last conditional permit to land temporarily, the cost thereof shall be payable from the appropriation for the enforcement of this Act.

(e) Refusal to transport or to pay. A failure or refusal on the part of the master, commanding officer, agent, owner, charterer, or consignee of a vessel, aircraft, or other transportation line to comply with the order of the Attorney General to take on board, guard safely, and transport to the destination specified any alien ordered to be deported under the provisions of this Act, or a failure or refusal by any such person to comply with an order of the Attorney General to pay deportation expenses in accordance with the requirements of this section, shall be punished by the imposition of a penalty in the sum and manner prescribed in section 237(b) [8 USCS § 1227(b)].

(f) Payment of expenses of physically incapable deportees. When in the opinion of the Attorney General the mental or physical condition of an alien being deported is such as to require personal care and attendance, the

Attorney General shall, when necessary, employ a suitable person for that purpose who shall accompany such alien to his final destination, and the expense incident to such service shall be defrayed in the same manner as the expense of deporting the accompanied alien is defrayed, and any failure or refusal to defray such expenses shall be punished in the manner prescribed by subsection (e) of this section.

(g) Countries delaying acceptance of deportees. Upon the notification by the Attorney General that any country upon request denies or unduly delays acceptance of the return of any alien who is a national, citizen, subject, or resident thereof, the Secretary of State shall instruct consular officers performing their duties in the territory of such country to discontinue the issuance of immigrant visas to nationals, citizens, subjects, or residents of such country, until such time as the Attorney General shall inform the Secretary of State that such country has accepted such alien.

(h) Withholding of deportation or return. (1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(d)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion. (2) Paragraph (1) shall not apply to any alien if the Attorney General determines that—

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

For purposes of subparagraph (B), an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime.

3. 14 U.S.C. 89 provides:

§ 89. Law enforcement

(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if

necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

(b) The officers of the Coast Guard insofar as they are engaged, pursuant to the authority contained in this section, in enforcing any law of the United States shall:

(1) be deemed to be acting as agents of the particular executive department or independent establishment charged with the administration of the particular law; and

(2) be subject to all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law.

(c) The provisions of this section are in addition to any powers conferred by law upon such officers, and not in limitation of any powers conferred by law upon such officers, or any other officers of the United States.

4. 8 C.F.R. Part 207 provides in relevant part:

PART 207—ADMISSION OF REFUGEES

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§ 207.1 Eligibility.

(a) *Presidential designation.* Before the beginning of each fiscal year the President determines (after appropriate consultation) the number and allocation of refugees who are of special humanitarian concern to the United States and who are to be admitted during the succeeding twelve months. Any alien who believes he/she is a "refugee" as defined in section 101(a)(42) of the Act, and is included in a refugee group of special humanitarian concern as designated by the President, may apply for admission to the United States by filing Form I-590 (Registration for Classification as Refugee) with the overseas Immigration and Naturalization Service's officer

in charge responsible for the area where the applicant is located. In those areas too distant from an officer in charge, making direct filing impracticable, the Form I-590 may be filed preliminarily at a designated consular office.

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§ 207.3 Inadmissible applicant.

(a) *Statutory exclusion.* An applicant within the class of aliens excluded from admission to the United States under paragraphs (27), (29), (33), or so much of paragraph (23) as it relates to trafficking in narcotics of section 212(a) of the Act, shall not be admitted as a refugee under section 207 of the Act. However, an applicant seeking refugee status under section 207 is exempt by statute from the exclusionary provisions of paragraphs (14), (15), (20), (21), (25), and (32) of section 212(a) of the Act and a waiver of exclusion is not required.

(b) *Waiver of exclusion.* Except for the exclusionary and statutory exemption provisions noted in § 207.3(a) any other exclusionary provisions of section 212(a) of the Act may be waived for humanitarian purposes, to assure family unity, or when it is in the public interest. This authority is delegated to officers in charge who shall initiate the necessary investigations to establish the facts in each waiver application pending before them. Form I-602 (Application by Refugee for Waiver of Grounds of Excludability) may be filed with the officer in charge before whom the applicant's Form I-590 is pending. The burden is upon the applicant to show that the waiver should be granted based upon: (1) Humanitarian purposes, (2) family unity, or (3) public interest. The applicant shall be notified in writing regarding the application for waiver, including the reason for denial if the application is denied. There is no appeal from a waiver denial under this chapter.

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§ 207.5 Waiting lists and priority handling.

Waiting lists are maintained for each designated refugee group of special humanitarian concern. Each applicant whose application is accepted for filing by the Immigration and Naturalization Service shall be registered as of the date of filing. The date of filing is the priority date for purposes of case control. Refugees or groups of refugees may be selected from these lists in a manner that will best support the policies and interests of the United States. The Attorney General may adopt appropriate criteria for selecting the refugees and assignment of processing priorities for each designated group based upon such considerations as: Reuniting families, close association with the United States, compelling humanitarian concerns, and public interest factors.

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5. 8 C.F.R. Part 208 provides in relevant part:

PART 208—ASYLUM

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§ 208.3 Form of application.

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(b) An application for asylum shall be deemed to constitute at the same time an application for withholding of deportation, pursuant to §§ 208.16, 236.3, and 242.17 of this chapter.

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§ 208.16 Entitlement to withholding of deportation.

(a) *Consideration of application for withholding of deportation.* If the Asylum Officer denies an alien's application for asylum, he shall also decide whether the alien is entitled to withholding of deportation under section 243(h) of the Act. If the application for asylum is

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granted, no decision on withholding of deportation will be made unless and until the grant of asylum is later revoked or terminated and deportation proceedings at which a new request for withholding of deportation is made are commenced. In such proceedings, an Immigration Judge may adjudicate both a renewed asylum claim and a request for withholding of deportation simultaneously whether or not asylum is granted.

(b) *Eligibility for withholding of deportation; burden of proof.* The burden of proof is on the applicant for withholding of deportation to establish that his life or freedom would be threatened in the proposed country of deportation on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible in light of general conditions in the applicant's country of nationality or last habitual residence, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

(1) The applicant's life or freedom shall be found to be threatened if it is more likely than not that he would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion.

(2) If the applicant is determined to have suffered persecution in the past such that his life or freedom was threatened in the proposed country of deportation on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that his life or freedom would be threatened on return to that country unless a preponderance of the evidence establishes that conditions in the country have changed to such an extent that it is no longer more likely than not that the applicant would be so persecuted there.

(3) In evaluating whether the applicant has sustained the burden of proving that his life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social

group, or political opinion, the Asylum Officer or Immigration Judge shall not require the applicant to provide eivdence that he would be singled out individually for such persecution if:

(i) He establishes that there is a pattern or practice in the country of proposed deportation of persecution of groups of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(ii) He establishes his own inclusion in and identification with such group of persons such that it is more likely than not that his life or freedom would be threatened upon return.

(4) In addition, the Asylum Officer or Immigration Judge shall give due consideration to evidence that the life or freedom of nationals or residents of the country of claimed persecution is threatened if they leave the country without authorization or seek asylum in another country.

(c) *Approval or denial of application.* The following standards shall govern approval or denial of applications for withholding of deportation:

(1) Subject to paragraph (c)(2) of this section, an application for withholding of deportation to a country of proposed deportation shall be granted if the applicant's eligibility for withholding is established pursuant to paragraph (b) of this section.

(2) An application for withholding of deportation shall be denied if:

(i) The alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(ii) The alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) There are serious reasons for considering that the alien has committed a serious nonpolitical crime out-

side the United States prior to arrival in the United States; or

(iv) There are reasonable grounds for regarding the alien as a danger to the security of the United States.

(3) If the evidence indicates that one or more of the grounds for denial of withholding of deportation enumerated in paragraph (c)(2) of this section apply, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

(4) In the event that an applicant is denied asylum solely in the exercise of discretion, and the applicant is subsequently granted withholding of deportation under this section, thereby effectively precluding admission of the applicant's spouse or minor children following to join him, the denial of asylum shall be reconsidered. Factors to be so considered will include the reasons for the denial and reasonable alternatives available to the applicant such as reunification with his spouse or minor children in a third country.

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6. Executive Order 12324, 46 Fed. Reg. 48,109 (Sept. 29, 1981), provides:

Interdiction of Illegal Aliens

By the authority vested in me as President by the Constitution and statutes of the United States of America, including Sections 212(f) and 215(a)(1) of the Immigration and Nationality Act, as amended (8 U.S.C. 1182(f) and 1185(a)(1)), in view of the continuing problem of migrants coming to the United States, by sea, without necessary entry documents, and in order to carry out the suspension and interdiction of such entry which have concurrently been proclaimed, it is hereby ordered as follows:

Section 1. The Secretary of State shall undertake to enter into, on behalf of the United States, cooperative ar-

rangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea.

Sec. 2. (a) The Secretary of the Department in which the Coast Guard is operating shall issue appropriate instructions to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens and the interdiction of any defined vessel carrying such aliens.

(b) Those instructions shall apply to any of the following defined vessels:

(1) Vessels of the United States, meaning any vessel documented under the laws of the United States, or numbered as provided by the Federal Boat Safety Act of 1971, as amended (46 U.S.C. 1451 *et seq.*), or owned in whole or in part by the United States, a citizen of the United States, or a corporation incorporated under the laws of the United States of any State, Territory, District, Commonwealth, or possession thereof, unless the vessel has been granted nationality by a foreign nation in accord with Article 5 of the Convention on the High Seas of 1958 (U.S. TIAS 5200; 13 UST 2312).

(2) Vessels without nationality or vessels assimilated to vessels without nationality in accordance with paragraph (2) of Article 6 of the Convention on the High Seas of 1958 (U.S. TIAS 5200; 13 UST 2312).

(3) Vessels of foreign nations with whom we have arrangements authorizing the United States to stop and board such vessels.

(c) Those instructions to the Coast Guard shall include appropriate directives providing for the Coast Guard:

(1) To stop and board defined vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons or violations of United

States law or the law of a country with which the United States has an arrangement authorizing such action.

(2) To make inquiries of those on board, examine documents and take such actions as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel.

(3) To return the vessel and its passengers to the country from which it came, when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist: provided, however, that no person who is a refugee will be returned without his consent.

(d) These actions, pursuant to this Section, are authorized to be undertaken only outside the territorial waters of the United States.

Sec. 3. The Attorney General shall, in consultation with the Secretary of State and the Secretary of the Department in which the Coast Guard is operating, take whatever steps are necessary to ensure the fair enforcement of our laws relating to immigration (including effective implementation of this Executive Order) and the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland.

/s/ Ronald Reagan

THE WHITE HOUSE.
September 29, 1981.

7. Presidential Proclamation 4865, 46 Fed. Reg. 48,107 (Sept. 29, 1981), provides:

High Seas Interdiction of Illegal Aliens

By the President of the United States of America

A Proclamation

The ongoing migration of persons to the United States in violation of our laws is a serious national problem detrimental to the interests of the United States. A particularly difficult aspect of the problem is the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States. These arrivals have severely strained the law enforcement resources of the Immigration and Naturalization Service and have threatened the welfare and safety of communities in that region.

As a result of our discussions with the Governments of affected foreign countries and with agencies of the Executive Branch of our Government, I have determined that new and effective measures to curtail these unlawful arrivals are necessary. In this regard, I have determined that international cooperation to intercept vessels trafficking in illegal migrants is a necessary and proper means of insuring the effective enforcement of our laws.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, by the authority vested in me by the Constitution and the statutes of the United States, including Sections 212(f) and 215(a)(1) of the Immigration and Nationality Act, as amended (8 U.S.C. 1182(f) and 1185(a)(1)), in order to protect the sovereignty of the United States, and in accordance with cooperative arrangements with certain foreign governments, and having found that the entry of undocumented aliens, arriving at the borders of the United States from

the high seas, is detrimental to the interests of the United States, do proclaim that:

The entry of undocumented aliens from the high seas is hereby suspended and shall be prevented by the interdiction of certain vessels carrying such aliens.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-ninth day of September, in the year of our Lord nineteen hundred and eighty-one, and of the Independence of the United States of America the two hundred and sixth.

/s/ Ronald Reagan

3. Executive Order No. 12807, 57 Fed. Reg. 23,133 (May 24, 1992), provides:

Interdiction of Illegal Aliens

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a)(1) of the Immigration and Nationality Act, as amended (8 U.S.C. 1182(f) and 1185(a)(1)), and whereas:

(1) The President has authority to suspend the entry of aliens coming by sea to the United States without necessary documentation, to establish reasonable rules and regulations regarding, and other limitations on, the entry or attempted entry of aliens into the United States, and to repatriate aliens interdicted beyond the territorial sea of the United States;

(2) The international legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees (U.S. T.I.A.S. 6577; 19 U.S.T. 6223) to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States;

(3) Proclamation No. 4865 suspends the entry of all undocumented aliens into the United States by the high seas; and

(4) There continues to be a serious problem of persons attempting to come to the United States by sea without necessary documentation and otherwise illegally;

I, GEORGE BUSH, President of the United States of America, hereby order as follows:

Section 1. The Secretary of State shall undertake to enter into, on behalf of the United States, cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea.

Sec. 2. (a) The Secretary of the Department in which the Coast Guard is operating, in consultation, where appropriate, with the Secretary of Defense, the Attorney General, and the Secretary of State, shall issue appropriate instructions to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens by sea and the interdiction of any defined vessel carrying such aliens.

(b) Those instructions shall apply to any of the following defined vessels:

(1) Vessels of the United States, meaning any vessel documented or numbered pursuant to the laws of the United States, or owned in whole or in part by the United States, a citizen of the United States, or a corporation incorporated under the laws of the United States or any State, Territory, District, Commonwealth, or possession thereof, unless the vessel has been granted nationality by a foreign nation in accord with Article 5 of the Convention on the High Seas of 1958 (U.S. T.I.A.S. 5200; 13 U.S.T. 2312).

(2) Vessels without nationality or vessels assimilated to vessels without nationality in accordance with para-

graph (2) of Article 6 of the Convention on the High Seas of 1958 (U.S. T.I.A.S. 5200; 13 U.S.T. 2312).

(3) Vessels of foreign nations with whom we have arrangements authorizing the United States to stop and board such vessels.

(c) Those instructions to the Coast Guard shall include appropriate directives providing for the Coast Guard:

(1) To stop and board defined vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons or violations of United States law or the law of a country with which the United States has an arrangement authorizing such action.

(2) To make inquiries of those on board, examine documents and take such actions as are necessary to carry out this order.

(3) To return the vessel and its passengers to the country from which it came, or to another country, when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist; provided, however, that the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent.

(d) These actions, pursuant to this section, are authorized to be undertaken only beyond the territorial sea of the United States.

Sec. 3. This order is intended only to improve the internal management of the Executive Branch. Neither this order nor any agency guidelines, procedures, instructions, directives, rules or regulations implementing this order shall create, or shall be construed to create, any right or benefit, substantive or procedural (including without limitation any right or benefit under the Ad-

ministrative Procedure Act), legally enforceable by any party against the United States, its agencies or instrumentalities, officers, employees, or any other person. Nor shall this order be construed to require any procedures to determine whether a person is a refugee.

Sec. 4. Executive Order No. 12324 is hereby revoked and replaced by this order.

Sec. 5. This order shall be effective immediately.

/s/ George Bush

THE WHITE HOUSE,

May 24, 1992.

9. The Agreement Between the United States and the Republic of Haiti, T.I.A.S. 10241, provides:

Agreement effected by exchange of notes
Signed at Port-au-Prince September 23, 1981;
Entered into force September 23, 1981.

The American Ambassador to the Haitian Secretary of State for Foreign Affairs

EMBASSY OF THE
UNITED STATES OF AMERICA
PORT-AU-PRINCE, HAITI

No. 277 *September 23, 1981*

EXCELLENCY:

I have the honor to refer to the mutual concern of the Governments of the United States and of the Republic of Haiti to stop the clandestine migration of numerous residents of Haiti to the United States and to the mutual desire of our two countries to cooperate to stop such illegal migration.

The United States Government confirms the understandings discussed by representatives of our two governments for the establishment of a cooperative program of interdiction and selective return to Haiti of certain Haitian migrants and vessels involved in illegal transport of persons coming from Haiti.

Having regard to the need for international cooperation regarding law enforcement measures taken with respect to vessels on the high seas and the international obligations mandated in the Protocol Relating to the Status of Refugees done at New York 31 January

1967,[1] the United States Government confirms with the Government of the Republic of Haiti its understanding of the following points of agreement:

Upon boarding a Haitian flag vessel, in accordance with this agreement, the authorities of the United States Government may address inquiries, examine documents and take such measures as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel. When these measures suggest that an offense against United States immigration laws or appropriate Haitian laws has been or is being committed, the Government of the Republic of Haiti consents to the detention on the high seas by the United States Coast Guard of the vessels and persons found on board.

The Government of Haiti agrees to permit upon prior notification the return of detained vessels and persons to a Haitian port, or if circumstances permit, the United States Government will release such vessels and migrants on the high seas to representatives of the Government of the Republic of Haiti.

The Government of the Republic of Haiti also agrees in the case of a U.S. flag vessel, outbound from Haiti, and engaged in such illegal trafficking, to permit, upon prior notification, the return to a Haitian port of that vessel and those aboard.

In any case where a Haitian flag vessel is detained, the authorities of the United States Government shall promptly inform the authorities of the Government of the Republic of Haiti of the action taken and shall keep them fully informed of any subsequent developments.

The Government of the Republic of Haiti agrees, to the extent permitted by Haitian law, to prosecute illegal traffickers of Haitian migrants who do not have requisite permission to enter the country of the vessel's destination

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[1] TIAS 6577; 19 UST 6223.

and to confiscate Haitian vessels or stateless vessels involved in such trafficking. The United States Government likewise agrees, to the extent permitted by United States law, to prosecute traffickers of United States nationality and to confiscate United States vessels engaged in such trafficking.

The Government of the United States agrees to the presence of a representative of the Navy of the Republic of Haiti as liaison aboard any United States vessel engaged in the implementation of this cooperative program.

The United States Government appreciates the assurances which it has received from the Government of the Republic of Haiti that Haitians returned to their country and who are not traffickers will not be subject to prosecution for illegal departure.

It is understood that under these arrangements the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status.

In furtherance of this cooperative undertaking the United States Government formally requests the Government of the Republic of Haiti's consent to the boarding by the authorities of the United States Government of private Haitian flag vessels [in any case] in which such authorities have reason to believe that the vessels may be involved in the irregular carriage of passengers outbound from Haiti.

I have the honor to propose that, if the foregoing is acceptable to the Government of the Republic of Haiti, this note and Your Excellency's confirmatory reply constitute an agreement between the United States Government and the Government of the Republic of Haiti which shall enter into force on the date of your reply and shall continue in force until six months from the date either government gives notice to the other of its intention to terminate the agreement.

Accept, Excellency, the renewed assurances of my highest consideration.

ERNEST H. PREEG

His Excellency
EDOUARD FRANCISQUE
Secretary of State for Foreign Affairs
Port-au-Prince

TRANSLATION

Republic of Haiti
Ministry of Foreign Affairs

Port-au-Prince, September 23, 1981

No. SG/CG: 2008

Mr. Ambassador:

I have the honor to acknowledge receipt of letter No. 277 of September 23, 1981, which reads as follows:

(For the English language text, see pp. 1-3.)

I have the honor to inform you that the Haitian Government agrees to the proposals transcribed above. Consequently, your letter and this reply shall constitute an agreement effected by an exchange of notes between the Government of the United States of America and the Government of the Republic of Haiti.

This agreement shall enter into force on September 23, 1981.

Accept, Mr. Ambassador, the renewed assurances of my high consideration.

E Francisque

EDOUARD FRANCISQUE
Minister of Foreign Affairs

His Excellency
Ernest H. Preeg,
Ambassador Extraordinary and Plenipotentiary
of the United States of America to Haiti.

10. The United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, provides:

PREAMBLE

The High Contracting Parties,

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,

Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement,

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,

Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,

Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner,

Have agreed as follows:

CHAPTER I

GENERAL PROVISIONS

Article 1.—Definition of the term "refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B. (1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either (*a*) "events occurring in Europe before 1 January 1951"; or (*b*) "events occurring in Europe or elsewhere before 1 January 1951"; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative (*a*) may at any time extend its obligations by adopting alternative (*b*) by means of a notification addressed to the Secretary-General of the United Nations.

C. This Convention shall cease to apply to any person falling under the terms of section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(2) Having lost his nationality, he has voluntarily reacquired it; or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(*a*) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(*b*) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(*c*) He has been guility of acts contrary to the purposes and principles of the United Nations.

Article 2.—General obligations

Every refugee has duties to the country in which he finds himself, which require in particular that he con-

form to its laws and regulations as well as to measures taken for the maintenance of public order.

Article 3.—Non-discrimination

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Article 4.—Religion

The Contracting States shall accord to refugees within their territories treatment at least as favorable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children.

Article 5.—Rights granted apart from this Convention

Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.

Article 6.—The term "in the same circumstances"

For the purposes of this Convention, the term "in the same circumstances" implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.

Article 7.—Exemption from reciprocity

1. Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.

2. After a period of three years' residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the Contracting States.

3. Each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State.

4. The Contracting States shall consider favourably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity to refugees who do not fulfil the conditions provided for in paragraphs 2 and 3.

5. The provisions of paragraphs 2 and 3 apply both to the rights and benefits referred to in articles 13, 18, 19, 21 and 22 of this Convention and to rights and benefits for which this Convention does not provide.

Article 8.—Exemption from exceptional measures

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favour of such refugees.

Article 9.—Provisional measures

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

Article 10.—Continuity of residence

1. Where a refugee has been forcibly displaced during the Second World War and removed to the territory of a Contracting State, and is resident there, the period of such enforced sojourn shall be considered to have been lawful residence within that territory.

2. Where a refugee has been forcibly displaced during the Second World War from the territory of a Contracting State and has, prior to the date of entry into force of this Convention, returned there for the purpose of taking up residence, the period of residence before and after such enforced displacement shall be regarded as one uninterrupted period for any purposes for which uninterrupted residence is required.

Article 11.—Refugee seamen

In the case of refugees regularly serving as crew members on board a ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment on its territory and the issue of travel documents to them or their temporary admission to its territory particularly with a view to facilitating their establishment in another country.

CHAPTER II

JURIDICAL STATUS

Article 12.—Personal status

1. The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.

2. Rights previously acquired by a refugee and dependent on personal status, more particularly rights at-

taching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee.

Article 13.—Movable and immovable property

The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less faovourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.

Article 14.—Artistic rights and industrial property

In respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic and scientific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting States, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence.

Article 15.—Right of association

As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.

Article 16.—Access to courts

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*.

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

CHAPTER III

GAINFUL EMPLOYMENT

Article 17.—Wage-earning employment

1. The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions:

(*a*) He has completed three years' residence in the country;

(*b*) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefit of this provision if he has abandoned his spouse;

(*c*) He has one or more children possessing the nationality of the country of residence.

3. The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

Artidle 18.—Self-employment

The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.

Article 19.—Liberal professions

1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.

CHAPTER IV

WELFARE

Article 20.—Rationing

Where a rationing system exists, which applies to the population at large and regulates the general distribu-

tion of products in short supply, refugees shall be accorded the same treatment as nationals.

Article 21.—Housing

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

Article 22.—Public education

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

Article 23.—Public relief

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

Article 24.—Labour legislation and social security

1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters;

(*a*) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

(*b*) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.

3. The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

4. The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.

CHAPTER V

ADMINISTRATIVE MEASURES

Article 25.—Administrative assistance

1. When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority.

2. The authority or authorities mentioned in paragraph 1 shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities.

3. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities, and shall be given credence in the absence of proof to the contrary.

4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.

5. The provisions of this article shall be without prejudice to articles 27 and 28.

Article 26.—Freedom of movement

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of

residence and move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.

Article 27.—Identity papers

The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

Article 28.—Travel documents

1. The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

2. Travel documents issued to refugees under previous international agreements by Parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.

Article 29.—Fiscal charges

1. The Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.

2. Nothing in the above paragraph shall prevent the application to refugees of the laws and regulations concerning charges in respect of the issue to aliens of administrative documents including identity papers.

Article 30.—Transfer of assets

1. A Contracting State shall, in conformity with its laws and regulations, permit refugees to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement.

2. A Contracting State shall give sympathetic consideration to the application of refugees for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted.

Article 31.—Refugees unlawfully in the country of refuge

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a terirtory where their life or freedom was threatened in the sense of article 1, enter or are present in their territoy without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admissions into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Article 32.—Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due

process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority of a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33.—Prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Article 34.—Naturalization

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

CHAPTER VI

EXECUTORY AND TRANSITORY PROVISIONS

Article 35.—Co-operation of the national authorities with the United Nations

1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

(*a*) The condition of refugees,

(*b*) The implementation of this Convention and,

(*c*) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article 36.—Information on national legislation

The Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention.

Article 37.—Relation to previous conventions

Without prejuduice to article 28, paragraph 2, of this Convention, this Convention replaces, as between Parties to it, the Arrangements of 5 July 1922, 31 May 1924, 12 May 1926, 30 June 1928 and 30 July 1935, the Conventions of 28 October 1933 and 10 February 1938, the

Protocol of 14 September 1939 and the Agreement of 15 October 1946.

CHAPTER VII

FINAL CLAUSES

Article 38.—Settlement of disputes

Any dispute between Parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article 39.—Signature, ratification and accession

1. This Convention shall be opened for signature at Geneva on 28 July 1951 and shall thereafter be deposited with the Secretary-General of the United Nations. It shall be open for signature at the European Office of the United Nations from 28 July to 31 August 1951 and shall be re-opened for signature at the Headquarters of the United Nations from 17 September 1951 to 31 December 1952.

2. This Convention shall be open for signature on behalf of all States Members of the United Nations, and also on behalf of any other State invited to attend the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons or to which an invitation to sign will have been addressed by the General Assembly. It shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall be open from 28 July 1951 for accession by the States referred to in paragraph 2 of this article. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 40.—Territorial application clause

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convetion enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article 41.—Federal clause

In the case of a Federal or non-unitary State, the following provisions shall apply:

(*a*) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of parties which are not Federal States;

(*b*) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the Federation, bound to take legislative action, the Federal Government shall bring

such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(*c*) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention showing the extent to which effect has been given to that provision by legislative or other action.

Article 42.—Reservations

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36-46 inclusive.

2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

Article 43.—Entry into force

1. This Convention shall come into force on the ninetieth day following the day of deposit of the sixth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the sixth instrument of ratification or accession, the Convention shall enter into force on the ninetieth day following the date of deposit by such State of its instrument of ratification or accession.

Article 44.—Denunciation

1. Any Contracting State may denounce this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the Contracting State concerned one year from the date upon which it is received by the Secretary-General of the United Nations.

3. Any State which has made a declaration or notification under article 40 may, at any time thereafter, by a notification to the Secretary-General of the United Nations, declare that the Convention shall cease to extend to such territory one year after the date of receipt of the notification by the Secretary-General.

Article 45.—Revision

1. Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall recommend the steps, if any, to be taken in respect of such request.

Article 46.—Notifications by the Secretary-General of the United Nations

The Secretary-General of the United Nations shall inform all Members of the United Nations and non-member States referred to in article 39:

(*a*) Of declarations and notifications in accordance with section B of article 1;

(*b*) Of signatures, ratifications and accessions in accordance with article 39;

(*c*) Of declarations and notifications in accordance with article 40;

(*d*) Of reservations and withdrawals in accordance with article 42;

(*e*) Of the date on which this Convention will come into force in accordance with article 43;

(*f*) Of denunciations and notifications in accordance with article 44;

(*g*) Of requests for revision in accordance with article 45.

IN FAITH WHEREOF the undersigned, duly authorized, have signed this Convention on behalf of their respective Governments.

DONE at Geneva, this twenty-eighth day of July, one thousand nine hundred and fifty-one, in a single copy, of which the English and French texts are equally authentic and which shall remain deposited in the archives of the United Nations, and certified true copies of which shall be delivered to all Members of the United Nations and to the non-member States referred to in article 39.

11. The United Nations Protocol Relating to the Status of Refugees, Jan. 11, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, provides:

PROTOCOL RELATING TO THE STATUS OF REFUGEES

The States Parties to the present Protocol,

Considering that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 [1] (hereinafter referred to as the Convention) covers only those persons who have become refugees as a result of events occurring before 1 January 1951,

Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned [sic] may therefore not fall within the scope of the Convention,

Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951,

Have agreed as follows:

[1] 189 UNTS 150.

Article I

GENERAL PROVISION

1. The States Parties to the present Protocol undertake to apply articles 2 to 34 [2] inclusive of the Convention to refugees as hereinafter defined.

2. For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words "As a result of events occurring before 1 January 1951 and . . ." and the words ". . . as a result of such events", in article 1 A (2) were omitted.

3. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article 1 B (1) (*a*) of the Convention, shall, unless extended under article 1 B (2) thereof, apply also under the present Protocol.

Article II

CO-OPERATION OF THE NATIONAL AUTHORITIES WITH THE UNITED NATIONS

1. The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.

2. In order to enable the Office of the High Commissioner, or any other agency of the United Nations which

[2] See p. 6264.

may succeed it, to make reports to the competent organs of the United Nations, the States Patries to the present Protocol undertake to provide them with the information and statistical data requested, in the appropriate form, concerning:

(*a*) The condition of refugees;

(*b*) The implementation of the present Protocol;

(*c*) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article III

INFORMATION ON NATIONAL LEGISLATION

The States Parties to the present Protocol shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of the present Protocol.

Article IV

SETTLEMENT OF DISPUTES

Any dispute between States Parties to the present Protocol which relates to its interpretation or application and which cannot be settled by other means shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article V

ACCESSION

The present Protocol shall be open for accession on behalf of all States Parties to the Convention and of any other State Member of the United Nations or member of any of the specialized agencies or to which an invitation to accede may have been addressed by the General

Assembly of the United Nations. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article VI

FEDERAL CLAUSE

In the case of a Federal or non-unitary State, the following provisions shall apply:

(*a*) With respect to those articles of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of States Parties which are not Federal States;

(*b*) With respect to those articles of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of constitutent States, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(*c*) A Federal State Party to the present Protocol shall, at the request of any other State Party hereto transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol, showing the extent to which effect has been given to that provision by legislative or other action.

Article VII

RESERVATIONS AND DECLARATIONS

1. At the time of accession, any State may make reservations in respect of article IV of the present Protocol and in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention other than those contained in articles 1, 3, 4, 16 (1) and 33 thereof, provided that in the case of a State Party to the Convention reservations made under this article shall not extend to refugees in respect of whom the Convention applies.

2. Reservations made by States Parties to the Convenveniton in accordance with article 42 thereof shall, unless withdrawn, be applicable in relation to their obligations under the present Protocol.

3. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw such reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

4. Declaration made under article 40, paragraphs 1 and 2, of the Convention by a State Party thereto which accedes to the present Protocol shall be deemed to apply in respect of the present Protocol, unless upon accession a notification to the contrary is addressed by the State Party concerned to the Secretary-General of the United Nations. The provisions of article 40, paragraphs 2 and 3, and of article 44, paragraph 3, of the Convention shall be deemed to apply *mutatis mutandis* to the present Protocol.

Article VIII

ENTRY INTO FORCE

1. The present Protocol shall come into force on the day of deposit of the sixth instrument of accession.

2. For each State acceding to the Protocol after the deposit of the sixth instrument of accession, the Protocol shall come into force on the date of deposit by such State of its instrument of accession.

Article IX

DENUNICIATION

1. Any State Party hereto may denounce this Protocol at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the State Party concerned one year from the date on which it is received by the Secretary-General of the United Nations.

Article X

NOTIFICATIONS BY THE SECRETARY-GENERAL OF THE UNITED NATIONS

The Secretary-General of the United Nations shall inform the States referred to in article V above of the date of entry into force, accessions, reservations and withdrawals of reservations to and denunciations of the present Protocol, and of declarations and notifications relating hereto.

Article XI

DEPOSIT IN THE ARCHIVES OF THE SECRETARIAT OF THE UNITED NATIONS

A copy of the present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, signed by the President of the General Assembly and by the Secretary-General of the United Nations, shall be deposited in the archives of the Secretariat of the United Nations. The Secretary-General will trans-

mit certified copies thereof to all States Members of the United Nations and to the other States referred to in article V above.

12. Article 22 of the United Nations Convention on the High Seas provides:

Article 22

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:

(*a*) That the ship is engaged in piracy; or
(*b*) That the ship is engaged in the slave trade; or
(*c*) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in sub-paragraphs (*a*), (*b*) and (*c*) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

13. Articles 31 and 32 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, provide:

Article 31. General Rule of Interpretation

(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the

terms of the treaty in their context and in the light of its object and purpose.

(2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

(3) There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

(4) A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary Means of Interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

14. Article 110 of the United Nations Convention on the Law of the Sea, Dec. 10, 1982, provides:

Article 110

Right of visit

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:

(a) the ship is engaged in piracy;

(b) the ship is engaged in the slave trade;

(c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;

(d) the ship is without nationality; or

(e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

4. These provisions apply *mutatis mutandis* to military aircraft.

5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.

SUPREME COURT OF THE UNITED STATES

No. 92-344

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

ORDER ALLOWING CERTIORARI
Filed October 5, 1992

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

October 5, 1992

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No. 92-344

In the Supreme Court of the United States

OCTOBER TERM, 1992

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v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals properly ordered the district court to enter a preliminary injunction barring implementation of Executive Order No. 12,807, which was issued by the President on May 24, 1992, to authorize repatriation directly to Haiti of Haitian migrants interdicted by the United States Coast Guard on the high seas.

PARTIES TO THE PROCEEDING

The petitioners are Lawrence Eagleburger, Acting Secretary of State (substituted as a party pursuant to Rule 35.3); William P. Barr, the Attorney General; Gene McNary, the Commissioner of the Immigration and Naturalization Service; Rear Admiral Robert Kramek and Admiral J. William Kime, United States Coast Guard; and the Commander of the United States Naval Base at Guantanamo Bay, Cuba.

The respondents are the Haitian Centers Council, Inc, the National Coalition for Haitian Refugees, Inc., the Immigration Law Clinic of the Jerome N. Frank Legal Services Organization of New Haven, Connecticut, and the following individual Haitian nationals: Dr. Frantz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, Roges Noel, A. Iris Vilnor, Mireille Berger, Yvrose Pierre and Mathieu Noel. The individual respondents brought the action on behalf of others similarly situated with respect to the interdiction program, including subclasses consisting of Haitian migrants who had been "screened in" or "screened out" or were awaiting screening; relatives of such individuals; and Haitian migrants who had retained one of the respondent organizations to represent them. Compl. ¶¶ 36-41 (J.A. 30-31).

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-344

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The court of appeals' opinions (Pet. App. 1a-72a, 73a-124a) are reported at 969 F.2d 1350 and 969 F.2d 1326. The district court's opinions (Pet. App. 125a-141a, 142a-163a, 164a-168a, 169a-170a) are not reported. The Eleventh Circuit's opinions in *Haitian Refugee Center* v. *Baker* (Pet. App. 171a-189a, 190a-252a) are reported at 949 F.2d 1109 and 953 F.2d 1498.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1992. The petition for a writ of certiorari was filed on August 24, 1992, and was granted on October 5, 1992. J.A. 415. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

TREATIES, STATUTES, EXECUTIVE ORDERS, REGULATIONS, AND RULES INVOLVED

The U.N. Convention Relating to the Status of Refugees; U.N. Protocol Relating to the Status of Refugees; 1981 Agreement Effected by Exchange of Notes, U.S.-Republic of Haiti; 5 U.S.C. 701-706; 8 U.S.C. 1101, 1105a, 1157-1158, 1182(f), 1185(a), 1225-1226, 1251-1253; Presidential Proclamation No. 4865; and Executive Orders Nos. 12,807 and 12,324 are reproduced at J.A. 329-412.

STATEMENT

1. This case arises out of the President's exercise of his constitutional and statutory authority to establish a program for interdicting would-be illegal migrants on the high seas. See 8 U.S.C. 1182(f), 1185(a); 14 U.S.C. 89. The interdiction program was instituted by a Proclamation issued by the President on September 29, 1981. Proc. No. 4865, 46 Fed. Reg. 48,107 (1981) (J.A. 375-376). The President found that uncontrolled illegal immigration by sea is a "serious national problem" and "detrimental to the interests of the United States." *Ibid.* Accordingly, "to protect the sovereignty of the United States," he proclaimed that "[t]he entry of undocumented aliens from the high seas is hereby suspended and shall be prevented by the interdiction of certain vessels carrying such aliens." *Ibid.*[1]

On the same day, the President also issued Executive Order No. 12,324, 46 Fed. Reg. 48,109 (1981) (J.A. 372-374), "to carry out the suspension [of entry] and interdiction" that had "concurrently been proclaimed." *Ibid.* The Order instructed the Coast Guard to intercept vessels suspected of transporting illegal migrants and to return all passengers without proper documentation to their country of

[1] Several days prior to the Proclamation, the United States had entered into an agreement with Haiti permitting U.S. officials to interdict and board Haitian flag vessels suspected of carrying illegal migrants. Agreement Effected by Exchange of Notes, U.S.-Republic of Haiti, Sept. 23, 1981, 33 U.S.T. 3559, T.I.A.S. No. 10,241 (J.A. 380-384).

origin, subject to a proviso that any "person who is a refugee" would not be repatriated without his consent. §§ 2(c)(1) and (3) (J.A. 374).

To implement the Executive Order, the Immigration and Naturalization Service (INS) conducted informal, non-adversarial "screening" interviews of interdictees on board Coast Guard cutters. Any interdictees who made a credible showing of political refugee status were tentatively "screened in" and brought to the United States, where they could file a formal application for political asylum under 8 U.S.C. 1158—and, in the process, attempt to establish that they were in fact "refugees" under 8 U.S.C. 1101(a)(42)(A). Interdictees unable to make such a threshold showing were "screened out" and returned immediately to Haiti. Pet. App. 75a-76a, 193a-197a.

The interdiction program has been effective in enforcing our immigration laws. Between 1981 and 1991, more than 25,000 would-be illegal migrants were interdicted. From October 1991 to May 1992, an additional 35,000 individuals were interdicted. Leahy Decl. ¶¶ 3, 4 and attachments (DX 152; J.A. 231-232, 235-238).[2] The program has also saved countless lives, as many of the boats could not have completed the long voyage to the United States.

2. a. The present crisis began with a military coup in Haiti on September 30, 1991, in which the democratically elected government of President Jean-Bertrand Aristide was overthrown. Although the United States temporarily halted repatriation of interdicted Haitian migrants following the coup, it resumed repatriations on November 18, 1991, when the immediate post-coup violence subsided. Pet. App. 76a, 144a, 197a.

On November 19, 1991, the Haitian Refugee Center and others filed a suit (*HRC* v. *Baker*) in the Southern District of Florida. Pet. App. 76a. They contended, *inter alia*,

[2] We have been informed by the Coast Guard that an additional 1634 Haitian migrants were interdicted from June through October of this year, including 731 in October alone.

that the repatriations violated 8 U.S.C. 1253(h), which provides that the Attorney General shall not deport or return an alien to a country if he determines that the alien's life or freedom would be threatened on account of political opinion. The district court immediately entered a temporary restraining order. DX 22. Because interdictions were continuing at a high rate and Coast Guard vessels were seriously overcrowded, U.S. officials decided to house interdictees temporarily at the U.S. Naval Base at Guantanamo Bay, Cuba. Cummings Decl. ¶ 11 (DX 119).

The district court in *HRC* subsequently certified a plaintiff class described below as (Pet. App. 7a):

> all Haitian aliens who are currently detained or who will in the future be detained on U.S. Coast Guard cutters or at Guantanamo Naval [B]ase who were interdicted on the high seas pursuant to the United States Interdiction Program and who are being denied First Amendment and procedural rights.

See also J.A. 115, 119. On December 3, 1991, the court then entered a preliminary injunction that continued the prohibition against repatriations. DX 120. The court relied on what it found to be a First Amendment right of plaintiff HRC to have access to the interdictees, and on Article 33.1 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (J.A. 385-406), which provides that a Contracting State shall not "expel or return ('refouler')" a refugee to a country where his life or freedom would be threatened on account of political opinion.[3] At the same time, the court rejected the claim by the class of present and future interdictees under 8 U.S.C. 1253(h), explaining that "the statutory rights and protections asserted are reserved, by the very terms of the

[3] The United States acceded to Article 33.1 of the Convention by ratifying the U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 189 U.N.T.S. 150 (J.A. 406-412).

statute[ ], to aliens within the United States." DX 120, at 53.

The Eleventh Circuit reversed the preliminary injunction, Pet. App. 171a-189a (*HRC I*), but the district court immediately entered further injunctions on other grounds. See Pet. App. 199a-202a. In late January 1992, the government sought emergency relief from the Eleventh Circuit, supported by evidence that the bar to repatriations was exacerbating the crisis by providing an incentive for Haitians to take to the seas. When the Eleventh Circuit failed to act promptly, the government sought a stay in this Court. This Court granted a stay the next day, and thus permitted repatriations to resume. 112 S. Ct. 1072 (1992). A few days later, the Eleventh Circuit reversed the remaining injunctions and ordered dismissal of the suit. Pet. App. 190a-252a (*HRC II*). It expressly rejected the Haitian plaintiffs' claim under 8 U.S.C. 1253(h), explaining that Section 1253(h) "is found in Part V of the INA" and that "[t]he [relevant] provisions of Part V * * * only apply to aliens 'in the United States.'" Pet. App. 215a (quoting 8 U.S.C. 1251, 1253(a)). This Court denied the *HRC* plaintiffs' certiorari petition on February 24, 1992. 112 S. Ct. 1245.

3. Less than a month later, respondents filed this suit in the Eastern District of New York, raising essentially the same challenges to the interdiction program that had been rejected in *HRC*. See J.A. 14-37 (2d Amend. Compl.). On April 6, 1992, the district court, relying on the First Amendment and the Due Process Clause, entered a preliminary injunction that (i) required petitioners to grant the respondent organizations "access" to interdictees housed at Guantanamo, and (ii) enjoined petitioners from reinterviewing or repatriating any interdictee who had been "screened in," without first allowing him to communicate with a lawyer. Pet. App. 142a-163a.[4] The

[4] The government had continued the practice of paroling into the United States under 8 U.S.C. 1182(d)(5) most Haitian migrants who

court certified a class of "screened in plaintiffs" entitled to that relief. *Id.* at 161a-162a. After unsuccessfully seeking a stay in the court of appeals, the government sought relief in this Court, which granted a stay on April 22, 1992. 112 S. Ct. 1714.

On June 10, 1992, the court of appeals vacated those portions of the preliminary injunction that required the government to grant the respondent organizations access to Guantanamo, but affirmed the prohibition against further processing or repatriation of "screened in" interdictees without affording them an opportunity to communicate with a lawyer. Pet. App. 73a-124a. On September 22, 1992, we filed a certiorari petition seeking review of the court of appeals' June 10 decision. See *McNary* v. *Haitian Centers Council, Inc.*, No. 92-528.

4. In May 1992, while the government's appeal of the preliminary injunction granting the respondent organizations access to Guantanamo was still pending before the Second Circuit, the number of individuals leaving Haiti surged dramatically: nearly 10,500 Haitians were interdicted in the first 20 days of that month, exceeding the total for the prior three months combined. By May 20, the tent camp at Guantanamo was nearing capacity. Leahy Decl. ¶¶ 5-6 (DX 152; J.A. 232); Allen Decl. ¶¶ 2-3 (DX 153; J.A. 239-240). For that reason, and to avoid dangerous overloading of its cutters, the Coast Guard issued orders to interdict only boats in imminent danger of foundering. But the migration continued, in unseaworthy and overloaded boats. At about the same time, a Haitian boat capsized off Cuba, resulting in the death of approximately half the forty migrants aboard. Leahy Decl. ¶¶ 6, 7 (J.A.

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made a sufficient threshold showing to be screened in. The INS decided, however, to reinterview at Guantanamo those interdictees who were tentatively screened in but found to have a communicable disease (most often the HIV virus) that rendered them excludable under 8 U.S.C. 1182(a)(1)(A)(i) (Supp. II 1990). See Pet. App. 82a-83a, 147a; 92-528 Pet. 6-8, 12-13 & n.13.

232). In addition, the State Department believed that a massive outmigration would make the United States "vulnerable to pressure tactics from the de facto authorities in Haiti * * * to abandon the embargo and other measures designed to speed the return of democracy." Kanter Decl. ¶ 4 (DX 154; J.A. 243).

At this juncture, the President had limited options. In light of the saturation of Guantanamo and Coast Guard cutters, the unwillingness of third countries to accept significant numbers of Haitian migrants, and the continuing massive outflow and risk of loss of life, the only practicable alternatives were either to bring all interdictees directly to the United States for screening, or to repatriate them all to Haiti immediately upon interdiction. Based on the judgment that the former course would precipitate a further outflow of a magnitude as yet unknown (with an even greater prospect of chaos and loss of life), the President concluded that all interdictees should be repatriated directly to Haiti. That conclusion was embodied in Executive Order No. 12,807, 57 Fed. Reg. 23,133 (1992) (J.A. 376-379), issued May 24, 1992, which replaced the 1981 Executive Order.[5] At the same time, the President decided to provide all Haitians access to processing of applications for refugee admission to the United States at our Embassy in Port-au-Prince, pursuant to 8 U.S.C. 1157 (Kanter Decl. ¶¶ 8, 10-11 ; J.A. 244-246), and to assure adequate Embassy staffing for that purpose. The President also ordered an immediate increase in humanitarian aid for the people of Haiti, and called on the international community to fur-

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[5] Although the 1992 Executive Order does not require screening of interdictees, it provides that "the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent." § 2(c)(3) (J.A. 378). Under Coast Guard instructions, an interdictee will not be repatriated immediately to Haiti if the commanding officer believes that he would be in immediate and exceptionally grave physical danger. In that situation, the commanding officer is to provide temporary refuge and seek direction from higher authority. Leahy Decl. ¶ 12 (J.A. 234).

nish additional assistance. 28 Weekly Comp. Pres. Doc. 924 (1992) (J.A. 245-246). We have been informed by the State Department that as of October 30, 1992, it had received applications on behalf of 15,566 persons since refugee processing began in Haiti earlier this year, that INS had adjudicated 2505 applications, and that 245 applications had been approved.

5. On May 27, 1992, respondents applied for a temporary restraining order to bar implementation of the May 24 Executive Order. Treating the application as a motion for a preliminary injunction, the district court denied relief. Pet. App. 164a-168a. It held, *inter alia*, that "Section [1253(h)] is * * * unavailable as a source of relief for Haitian aliens in international waters." *Id.* at 167a-168a.

6. On July 29, 1992, a divided Second Circuit panel reversed and ordered entry of a preliminary injunction, albeit without addressing the government's argument that the INA precludes judicial review of the interdiction program. Pet. App. 1a-72a.

a. The majority first held that the Haitian plaintiffs' claim under 8 U.S.C. 1253(h) is not barred under collateral estoppel principles by the Eleventh Circuit's holding in *HRC II* that Section 1253(h) does not apply to aliens outside the United States. Pet. App. 7a-14a. The majority acknowledged that the *HRC* class includes "all Haitian aliens who are currently detained or who will in the future be detained * * * who were interdicted on the high seas pursuant to the United States Interdiction Program." *Id.* at 7a. But it believed that the class here consists of different plaintiffs, on the theory that interdictions after May 24 are not pursuant to the "United States Interdiction Program" referred to in *HRC*, but pursuant to a "different" program that provides for repatriation without screening. *Id.* at 9a-11a. The majority also expressed the view that collateral estoppel should not apply because the May 1992 Executive Order constituted "an intervening change in the applicable legal context," because "few judicial resources would be saved by

collaterally estopping these plaintiffs," and because "[t]he federal judicial hierarchy deserves this opportunity to consider this weighty issue on the merits." *Id.* at 12a-14a.

Reaching the merits, the majority held that 8 U.S.C. 1253(h) applies to aliens outside the United States. It acknowledged the presumption against extraterritorial application of federal statutes, but found the presumption overcome here by the reference in Section 1253(h) to "any alien." Pet. App. 15a-18a. The majority disagreed with the Eleventh Circuit's view in *HRC II* that the various references in Part V of the INA to aliens "in the United States" establish that Section 1253(h) is so limited. *Id.* at 19a-21a. The government also argued that its interpretation of Section 1253(h) is supported by Article 33.1 of the U.N. Convention, to which Section 1253(h) was meant to conform, pointing out that the May 1992 Executive Order formally construes Article 33.1 not to apply to aliens outside the territory of a Contracting State. The majority, however, rejected the President's construction of Article 33.1 (Pet. App. 23a-35a), labeling it a "litigating posture" (*id.* at 30a, 31a), and held that Section 1253(h) creates a right of non-repatriation that is independent of the rest of Part V of the INA. *Id.* at 35a.

b. Judge Walker dissented. Pet. App. 43a-62a. He would have found the interdictees' claim barred by collateral estoppel, *id.* at 43a-52a, because extraterritorial application of Section 1253(h) was rejected in *HRC*, and because the certified class in this case ("all Haitian citizens who have been or will be screened in") is included within the *HRC* class of Haitians "who are currently detained or who in the future will be detained." *Id.* at 45a-46a. Judge Walker disagreed with the majority's view that the May 1992 Executive Order constituted an "intervening change" justifying a refusal to apply collateral estoppel, *id.* at 46a-49a, noting that "the legal grounds *upon which th[e] prior litigation was resolved*" have not changed. *Id.* at 49a-50a. On the merits, Judge Walker found the language of 8 U.S.C. 1253(h) ambiguous, Pet. App. 52a-55a, but con-

cluded that the background of the 1980 amendments—including the parallel provisions of Article 33 of the Convention—made it clear that Section 1253(h) does not apply outside the United States. Pet. App. 55a-68a.

7. Later in the day on July 29, 1992, the district court entered a preliminary injunction in accordance with the court of appeals' decision, barring repatriation to Haiti of "any interdicted Haitian" whose life or freedom would be threatened on account of his or her political opinion. Pet. App. 169a-170a. On August 1, 1992, this Court granted petitioners' application for a stay of the court of appeals' judgment and the district court's injunction.

INTRODUCTION AND SUMMARY OF ARGUMENT

The May 24, 1992, Executive Order represents the President's considered response to a life-threatening crisis on the high seas. By enjoining the President's action, the court of appeals has interfered directly with the operation of military vessels under his command and upset the delicate balance of diplomatic and other measures he instituted to resolve the broader crisis concerning that country. The effect can only be to encourage yet another massive outmigration from Haiti. The court of appeals' ruling, however, rests on four fundamental errors, each sufficient in itself to require reversal.

I. The INA precludes judicial review in this case. Congress expressly authorized review of determinations affecting aliens who are in the United States or at our borders and subject to deportation or exclusion proceedings. See 8 U.S.C. 1105a. The marked absence of comparable provisions for aliens beyond our shores impliedly precludes judicial review at their behest. Moreover, Congress enacted 8 U.S.C. 1105a in 1961 to confine judicial review of exclusion orders to habeas corpus proceedings, and thereby to overturn *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956), which held that such orders were also subject to review in a declaratory judgment action under the APA. *A fortiori*, APA review

is not available to aliens who have not even reached our shores. That conclusion is reinforced by the nature of the action respondents challenge—a policy instituted by the President pursuant to broad statutory authority, implemented on the high seas using military vessels, and integrated into the Nation's overall response to the international crisis concerning Haiti.

II. Respondents' claim that 8 U.S.C. 1253(h) prohibits their repatriation to Haiti is foreclosed under the doctrine of collateral estoppel by the Eleventh Circuit's decision in *HRC* v. *Baker*, which rejected such a claim. The plaintiffs in this case do not fall outside the *HRC* class on the theory that the "Interdiction Program" referred to in the *HRC* class definition ended with the 1992 Executive Order. The interdiction program was established by the 1981 Presidential Proclamation, which remains in effect. The 1992 Executive Order merely prescribed different procedures *after* interdiction. Nor has there been any amendment of 8 U.S.C. 1253(h) or other change in the legal principles on which the Eleventh Circuit relied in *HRC* that could render collateral estoppel inapplicable.

III. On the merits, the court of appeals' holding that 8 U.S.C. 1253(h) applies to aliens on the high seas cannot be reconciled with the presumption against extraterritorial application of Acts of Congress, because there is no clear expression of congressional intent to apply Section 1253(h) outside the United States.

Paragraph (1) of Section 1253(h) provides that "[t]he Attorney General shall not deport or return any alien" to a country if he determines that the alien would be threatened with persecution. Section 1253(h) speaks only to the Attorney General because it is located in Part V of the INA, which prescribes procedures for expelling aliens from the United States—a matter for which the Attorney General is responsible. There is no mention of the Coast Guard or any other agency that might encounter a potential refugee *outside* the United States. Furthermore, numerous provisions in Part V of the INA—

including paragraph (2) of Section 1253(h) itself—expressly refer to aliens "in the United States," thereby confirming that Section 1253(h) applies only to such aliens.

This interpretation of Section 1253(h) is confirmed by Article 33 of the U.N. Convention Relating to the Status of Refugees, after which Section 1253(h) was patterned. The President has formally construed Article 33 not to apply outside United States territory, and that interpretation is entitled to great weight. Nothing in paragraph 1 of Article 33—which provides that a Contracting State shall not "expel or return ('refouler')" a refugee—is to the contrary. The word "expel" in Article 33 obviously refers to an alien in the Contracting State, and one meaning of the French word "refouler" is "expel (aliens)," which indicates that the term "return ('refouler')" in Article 33 rests on a parallel territorial premise. Moreover, paragraph 2 of Article 33 expressly contemplates that a refugee protected by that Article has already arrived in his country of refuge. This territorial premise is woven into numerous other provisions of the Convention as well. In addition, the negotiating history conclusively demonstrates that this indeed was the parties' intent, and Article 33 was interpreted in that manner when the United States acceded to the Convention in 1968, when 8 U.S.C. 1253(h) was amended to conform to Article 33 in 1980, and when the State Department addressed the issue in a formal policy statement in 1972, congressional testimony, and international negotiations.

Contrary to the court of appeals' view, the 1980 amendments to 8 U.S.C. 1253(h) that deleted the phrase "within the United States" did not extend it to aliens beyond our borders. The legislative history of those amendments shows that they had the far more modest purpose of applying Section 1253(h) in exclusion as well as deportation proceedings, because *Leng May Ma* v. *Barber*, 357 U.S. 185 (1958), had relied on the phrase "within the United States" in holding that the prior version of Section 1253(h) did not apply in exclusion proceedings.

IV. Equitable principles in any event foreclose an award of injunctive relief to aliens outside the United States that bars implementation of the President's directives in this sensitive area of military operations and foreign policy.

ARGUMENT

THE COURT OF APPEALS IMPROPERLY ENJOINED IMPLEMENTATION OF THE PRESIDENT'S DIRECTIVE IN EXECUTIVE ORDER 12,807 TO REPATRIATE INTERDICTED HAITIAN MIGRANTS DIRECTLY TO HAITI

I. JUDICIAL REVIEW OF THE PRESIDENT'S POLICY IS PRECLUDED BY THE IMMIGRATION AND NATIONALITY ACT

The Haitian plaintiffs in this case—aliens who are outside the United States—have no basis for invoking the jurisdiction of U.S. courts to seek the extraordinary relief ordered here. The only plausible basis for judicial review would be the cause of action established by the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* But as the Eleventh Circuit held in *HRC II*, Pet. App. 204a-209a, the INA impliedly "preclude[s] judicial review" under the APA in this setting. See 5 U.S.C. 701(a)(1).[6]

Whether a statute precludes judicial review "is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 345 (1984); accord, *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988); *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 131-133 (1987); see also *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297, 301 (1943) ("type of problem involved" and "history of the statute" are "highly relevant"). Furthermore, any "presumption" of reviewability "runs

[6] For the reasons stated in Point II, *infra*, the Eleventh Circuit's holding in *HRC II* that the INA precludes judicial review pursuant to the APA, Pet. App. 214a-216a, binds respondents here under collateral estoppel principles. See Pet. 13 n.7.

aground when it encounters concerns of national security," *Egan*, 484 U.S. at 527—including, here, the President's conduct of foreign relations and his institution of measures outside the United States to protect the Nation's borders.[7] These considerations require the conclusion that the INA forecloses review of the President's action.

A. The INA prescribes detailed procedures for administrative and judicial review of refugee and other determinations made with respect to aliens who have arrived in the United States but, in marked contrast, the Act contains no comparable provisions for administrative or judicial review at the behest of aliens outside the United States. Thus, the Act establishes detailed procedures for administrative hearings in both exclusion and deportation cases, 8 U.S.C. 1226, 1252, and specifically provides in 8 U.S.C. 1105a for judicial review. Section 1105a(a) states that the procedure established by 28 U.S.C. 2341-2351, which provides for judicial review directly in the courts of appeals, "shall be the sole and exclusive procedure" for judicial review of final orders of deportation made under 8 U.S.C. 1252(b) against aliens "within the United States." Section 1105a(b) states that, "[n]otwithstanding the provisions of any other law," an alien against whom a final order of exclusion has been made under 8 U.S.C. 1226 "may obtain judicial review of such order by habeas corpus proceedings and not otherwise." This

[7] Even where it applies, "[t]he presumption favoring judicial review of administrative action is just that—a presumption." *Community Nutrition Inst.*, 467 U.S. at 341. And although the Court has observed that the presumption may be overcome only upon a showing of "clear and convincing evidence," the Court has never applied that standard "in the strict evidentiary sense"; it is sufficient that "the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" *Id.* at 350-351 (quoting *Data Processing Serv.* v. *Camp*, 397 U.S. 150, 157 (1970)).

provision likewise is available only to aliens who have already arrived at our borders.[8]

By contrast, 8 U.S.C. 1157, which confers discretionary authority on the President and the Attorney General with respect to aliens *outside* the United States who seek refugee status, does *not* provide for either administrative or judicial review. *HRC II*, Pet. App. 206a. Accordingly, Congress's intent to preclude judicial review for such aliens is " 'fairly discernible' in the detail of the legislative scheme," *Community Nutrition Inst.*, 467 U.S. at 351, for where "a statute provides a detailed mechanism for * * * judicial review of particular issues at the behest of [particular] persons, judicial review of those issues at the behest of other persons [is] impliedly precluded." *Id.* at 349; see also *United States* v. *Fausto*, 484 U.S. 439, 448-449 (1988); *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982). This result conforms to Congress's traditional unwillingness to permit judicial review of immigration decisions concerning aliens who have "never presented [themselves] at the borders." *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184 n.3 (1956).[9]

B. When Congress enacted 8 U.S.C. 1105a(b) in 1961 (Pub. L. No. 87-301, § 5(a), 75 Stat. 651), it did so for the specific purpose of *precluding* APA suits to challenge

[8] See 8 U.S.C. 1226(a) (special inquiry officer has authority to determine whether an "arriving alien" who has been detained under 8 U.S.C. 1225 shall be allowed to enter or shall be excluded and deported); 8 U.S.C. 1225(a) (referring to aliens "arriving at ports of the United States," "being brought into the United States," or "coming into the United States"); 8 U.S.C. 1225(b) ("port of arrival").

[9] This principle is reflected in the settled rule that visa decisions by U.S. consular officers are unreviewable. See *Tom We Shung*, 352 U.S. at 185 n.6; *Li Hing of Hong Kong, Inc.* v. *Levin*, 800 F.2d 970, 971 (9th Cir. 1986); *Wan Shih Hsieh* v. *Kiley*, 569 F.2d 1179, 1181 (2d Cir.), cert. denied, 439 U.S. 828 (1978); *Te Kuei Liu* v. *INS*, 645 F.2d 279, 285 (5th Cir. 1981); *Pena* v. *Kissinger*, 409 F. Supp. 1182, 1185-1188 (S.D.N.Y. 1976). See also *HRC II*, Pet. App. 207a-209a (discussing *Cobb* v. *Murrell*, 386 F.2d 947 (5th Cir. 1967), and *Braude* v. *Wirtz*, 350 F.2d 702 (9th Cir. 1965)).

exclusion decisions. Prior to those amendments, this Court had held in *Tom We Shung* that an alien could challenge an order of exclusion in a declaratory judgment action brought under Section 10 of the APA, 5 U.S.C. 1009 (1952), rejecting the government's contention that judicial review was confined to habeas corpus proceedings, as it had been prior to enactment of the INA in 1952. See 352 U.S. at 182, 184-185. The House Report on the 1961 amendments contains an extensive discussion of *Tom We Shung*, and it expresses an intention to overrule that decision and to restore the prior practice of confining judicial review of exclusion matters to habeas corpus proceedings. See H.R. Rep. No. 1086, 87th Cong., 1st Sess. 30-33 (1961); compare *Ardestani* v. *INS*, 112 S. Ct. 515, 518-519 (1991). In light of Congress's preclusion of review under the APA even for aliens who have reached our borders, it follows *a fortiori* that aliens who have never reached our borders may not invoke the APA to challenge governmental actions in connection with their efforts to enter the United States.[10] See also H.R. Rep. No. 1086, *supra*, at 33 ("The sovereign United States cannot give recognition to a fallacious doctrine that an alien has a 'right' to enter this country which he may litigate in the courts of the United States against the U.S. Government as a defendant.").

It also is significant that even as the Court held in *Tom We Shung* that APA review was available to aliens who were challenging an order of exclusion, it pointedly did "not suggest, of course, that an alien who has never presented himself at the borders of this country may avail himself of the declaratory judgment action by bringing the action from abroad." 352 U.S. at 184 n.3. The Court also

[10] Aliens beyond our borders likewise have no right to challenge those governmental actions in habeas corpus proceedings, *Johnson* v. *Eisentrager*, 339 U.S. 763, 771, 777-781, 790-701 (1950); cf. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269, 271, 273-275 (1990), and indeed respondents have not sought habeas corpus relief.

quoted a passage in the 1952 Senate Report on the INA stating that although the INA then omitted a provision limiting judicial review of exclusion determinations to habeas corpus proceedings, that omission was "not intended to grant any review of determinations made by consular officers." 352 U.S. at 185 n.6 (quoting S. Rep. No. 1137, 82d Cong., 2d Sess. 28 (1952)). When Congress enacted 8 U.S.C. 1105a(b) in 1961 to overturn *Tom We Shung* in other respects, it did not disturb the settled understanding reflected in the Court's opinion that judicial review is not available to aliens outside the United States.

C. The "nature of the administrative action" respondents challenge and the "type of problem involved" also weigh heavily against recognizing a right of judicial review here. *Community Nutrition Inst.*, 467 U.S. at 345; *Switchmen's Union*, 320 U.S. at 301. The interdiction policy was instituted by the President pursuant to his broad statutory authority to protect the Nation's borders and to restrict entry of any aliens or class of aliens "[w]henever the President finds" that their entry "would be detrimental to the interests of the United States." 8 U.S.C. 1182(f).[11] The fact that the INA assigns this responsibility directly to the President is sufficient in itself to demonstrate that Congress did not contemplate any role for the courts. *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2775-2776 (1992). So, too, is the fact that the Act grants authority in discretionary terms and conditions its exercise only upon a Presidential finding concerning the "interests of the United States," which renders the President's actions particularly unamenable to judicial scrutiny. *United States ex rel. Knauff* v. *Shaughnessy*,

[11] Similarly, 8 U.S.C. 1185(a)(1) grants the President broad discretion to impose restrictions on aliens attempting to enter the United States, and 14 U.S.C. 89(a) authorizes the Coast Guard (which operates under the direction of the President) to interdict vessels on the high seas where violations of U.S. law are concerned and to take "appropriate" action after doing so.

338 U.S. 537, 542-543 (1950); *Ludecke* v. *Watkins*, 335 U.S. 160 (1948); see also *Webster* v. *Doe*, 486 U.S. 592, 600 (1988); *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 110-114 (1948); *United States* v. *George S. Bush & Co.*, 310 U.S. 371, 379-380 (1940).

The soundness of the INA's preclusion of review is especially evident in this case, because the measures respondents challenge—interdiction of aliens on the high seas and repatriation to a foreign country, through use of military vessels and as part of the United States' overall response to the international crisis affecting Haiti—are integral to the President's responsibilities as Commander in Chief (U.S. Const. Art. II, § 2, Cl. 1) and the "sole organ of the nation in its external relations," *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). The courts should not review the President's orders in this setting in the absence of the clearest expression of congressional intent to allow them to do so. There simply is no such expression here.

II. RESPONDENTS' CLAIM UNDER 8 U.S.C. 1253(h) IS BARRED UNDER COLLATERAL ESTOPPEL PRINCIPLES BY THE ELEVENTH CIRCUIT'S JUDGMENT IN *HRC* v. *BAKER*

The statutory preclusion of review discussed in Point I, *supra*, is not the only obstacle to this suit. The doctrine of collateral estopped likewise bars respondents' challenge to the May 1992 Executive Order under 8 U.S.C. 1253(h), by virtue of the Eleventh Circuit's judgment in *HRC II*.

"[U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation." *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867, 874 (1984). Indeed, strict application of preclusion principles is essential to the proper functioning of the class action mechanism. As Judge Walker noted in dissent below, "[t]he policy behind the class action device is, of course, to facilitate the final determination of numerous claims in one suit. This policy

is not furthered by allowing subsequent collateral attacks by class members." Pet. App. 44a.

Although res judicata does not bar respondents' challenge to a change in policy that occurred after the conclusion of the *HRC* litigation, collateral estoppel does bar this challenge because the dispositive legal issues and the parties to the class simply have not changed. "Under collateral estoppel, once a court has decided an *issue* of fact or law necessary to its judgment, that decision may preclude relitigation of the *issue* in a suit on a different cause of action involving a party to the first case." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980) (emphasis added). Indeed, the distinctive feature of collateral estoppel (as opposed to res judicata) is precisely that it does *not* depend upon an identity between the causes of action asserted in prior and subsequent litigation. *Montana* v. *United States*, 440 U.S. 147, 154 (1979); 1B J. Moore, *Federal Practice* ¶ 0.441[2], at 724 (2d ed. 1992).

The Eleventh Circuit held in *HRC II* that 8 U.S.C. 1253(h) does not apply to aliens who are not "in the United States." Pet. App. 214a-216a. That ruling bound a class of "[a]ll Haitian refugees who are currently detained or who in the future will be detained on United States Coast Guard Cutters and at Guantanamo Naval Base or elsewhere who were or will be interdicted on the high seas pursuant to the United States Interdiction Program and who are being denied * * * procedural rights." *HRC* 2d Amend. Compl. (J.A. 115); Pet. App. 7a. The Haitian plaintiffs in this case fall squarely within that definition: they have been or will be interdicted on the high seas pursuant to the President's interdiction program, and as in *HRC*, they allege a lack of suitable screening procedures. The court of appeals nevertheless held that the Haitian plaintiffs in this case are not bound by the judgment in *HRC II*. Its analysis cannot withstand scrutiny.

A. The court below first held that the plaintiffs in this case do not fall within the class definition in *HRC* because the President's issuance of the May 1992 Executive Order

marked an end to the "United States Interdiction Program" referred to in *HRC*. Pet. App. 9a-11a. That is wrong. As Judge Walker noted, both the 1992 Executive Order and its predecessor were issued to carry out the 1981 Presidential Proclamation, which was entitled "High Seas Interdiction of Illegal Aliens." Pet. App. 47a; see pages 2-3, *supra*. It was the Proclamation, which remains in effect to this day, that established the interdiction program. Although the 1992 Executive Order changed the manner in which Haitian migrants are processed *after* they are interdicted, it did not end the ongoing interdiction program or eliminate the identity of the parties who have challenged the government's procedures as inadequate under 8 U.S.C. 1253(h) both before *and* after that Order.[12] Accordingly, *all* Haitian migrants repatriated pursuant to

[12] This conclusion is supported by the complaint in *HRC*. Paragraph 32 of that complaint leads off its factual description of the "Interdiction Program" by stating: "On September 29, 1981, the President issued Proclamation 4865, FR Doc. 81-28828, 46 Fed. Reg. 48107 ('the Proclamation'), which announced a program of 'interdiction: on the high seas of vessels transporting aliens.'" J.A. 106. The "United States Interdiction Program" mentioned in the class definition in paragraph 62(a) of the complaint (J.A. 115) presumably refers to the "program of 'interdiction'" mentioned in paragraph 32—a program embodied in the Proclamation. Furthermore, paragraph 62(a) describes three separate elements of class membership: it refers to all Haitian refugees (1) "who are currently detained or who in the future will be detained"; (2) "who were or will be interdicted on the high seas pursuant to the United States Interdiction Program"; and (3) "who are asserting violations of their * * * procedural rights." The "Interdiction Program" is mentioned only in the second of these elements, which is limited to the interdiction itself (*i.e.*, to the interception of vessels). The alleged violation of "procedural rights" resulting from repatriation without screening occurs only *after* interdiction, and it is covered by a separate element of the class definition that does not refer to the "Interdiction Program." Accordingly, although respondents allege that elimination of screening constitutes a new type of post-interdiction "procedural violation," it does not constitute a new "Interdiction Program."

the 1992 Executive Order fall squarely within the class certified in *HRC*.[13]

The *HRC* plaintiffs did not draft their class definition with the intention of placing narrow limits on the scope of the class. Rather, they sought to ensure adjudication of the rights of *all* Haitian migrants who might thereafter be interdicted on the high seas and who might therefore benefit from a holding that 8 U.S.C. 1253(h) applies in that setting—a class that unquestionably includes the Haitian plaintiffs in this case. Moreover, insofar as the extraterritorial application of Section 1253(h) is concerned, Haitian migrants interdicted prior to May 24, 1992, share a community of interests with those interdicted thereafter. It accordingly is entirely fair that the plaintiffs in this case who invoke Section 1253(h) to challenge the 1992 Executive Order are bound by the judgment in *HRC II*.

B. The court of appeals also held that respondents' claims under 8 U.S.C. 1253(h) are not precluded by the judgment in *HRC II* because the 1992 Executive Order constituted "an intervening change in the applicable legal context." Pet. App. 12a. That exception to ordinary preclusion principles, however, applies only where there have been "modifications in 'controlling legal principles,' [which] * * * could render a previous determination inconsistent with prevailing doctrine." *Montana*, 440 U.S. at 161. We may assume that collateral estoppel would be inapplicable here under that exception if Congress had amended 8 U.S.C. 1253(h), or if this Court had issued an intervening decision establishing that the Eleventh Circuit's holding in *HRC II* concerning the scope of Sec-

[13] Ironically, the only class certified thus far by the district court in the present case consists of Haitian migrants who were "screened in" under the policy that was in effect prior the May 1992 Executive Order. Pet. App. 162a. Even if the court of appeals were correct that the "United States Interdiction Program" referred to in *HRC* ended on May 24, *all* members of the certified class here were interdicted under that Program, and thus fall within the *HRC* class definition. See also Reply Br. Pet. Stage 6-7 n.4.

tion 1253(h) was erroneous.[14] But here no change has been wrought in the legal principles on which the Eleventh Circuit relied in *HRC* in sustaining the government's practices. All that has happened is that the President has modified those practices in certain respects by issuing the 1992 Executive Order. That Order necessarily assumes the correctness of the Eleventh Circuit's holding that Section 1253(h) is inapplicable to Haitian migrants interdicted on the high seas, and it therefore is in conformity with the "applicable legal context" that controlled the decision in *HRC II*. Moreover, a change in the defendants' own conduct manifestly does not constitute an "intervening change" in the controlling principles under which the legality of that conduct must be evaluated. It therefore does not fall within the exception on which the court below relied. See Pet. App. 49a-50a (Walker, J., dissenting); 18 C. Wright *et al.*, *Federal Practice and Procedure* § 4425, at 259 (1981); Restatement (Second) of Judgments § 28(2)(b) and comment c (1982); see, *e.g.*, *Commissioner* v. *Sunnen*, 333 U.S. 591, 598-600 (1948).[15]

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[14] Even then, however, the proper course would be for respondents and other Haitians who are members of the *HRC* class to file a motion for relief from the judgment in *HRC* itself, on the ground that "it is no longer equitable that the judgment should have prospective application" in light of the intervening amendment or ruling, or that the new development constitutes a "reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(5)-(6); cf. *Rufo* v. *Inmates of Suffolk County Jail*, 112 S. Ct. 748, 762-763 (1992).

[15] The court of appeals did not suggest that the May 1992 Executive Order constituted a change in *facts* essential to the judgment in *HRC II* that would render collateral estoppel inapplicable. See *Montana*, 440 U.S. at 159-160. In rejecting the *HRC* plaintiffs' claims under 8 U.S.C. 1253(h), the Eleventh Circuit did not rely on any determination as to the existence or adequacy of the refugee screening procedures then in place; it held that 8 U.S.C. 1253(h) is altogether inapplicable to aliens outside the United States. Pet. App. 214a-216a; see Pet. App. 84a-85a (Walker, J., dissenting). Accordingly, a modification or elimination of screening procedures does not alter any of the facts on which the judgment in *HRC II* necessarily rested. Compare *Montana*, 440 U.S. at 158-162.

In a related vein, the court of appeals adverted (Pet. App. 12a) to this Court's observation that preclusion "may be inappropriate" in successive cases involving "unmixed questions of law," although the court of appeals omitted any mention of the further requirement that the successive cases be ones involving "substantially unrelated claims." *Montana*, 440 U.S. at 162-164; *United States* v. *Moser*, 266 U.S. 236, 242 (1924). The precise scope of this exception "may be difficult to delineate," but this case, like *Montana*, "poses no such conceptual difficulties." 440 U.S. at 163. Because this suit was filed shortly after the judgment in *HRC II* became final and involves the same interdiction program, "the legal 'demands' of this litigation are closely aligned in time and subject matter to those in [*HRC*]." *Ibid.*, see also *United States* v. *Stauffer Chem. Co.*, 464 U.S. 165, 172 (1984).

C. The court of appeals sought to bolster its refusal to apply collateral estoppel by expressing the view that the government had contravened "representations" made in its brief in opposition to the certiorari petition in *HRC*. Pet. App. 13a-14a. This reasoning is seriously flawed.

1. The court's suggestion that the government acted in bad faith—epitomized by its characterization of the government's conduct as "gamemanship of the rankest sort," Pet. App. 40a (Newman, J., concurring)—is entirely unfounded. Although the brief in opposition in *HRC* described the government's then-current policy, it did not purport to guarantee that the policy would remain unchanged, and it would have been irresponsible to do so; in fact, the brief emphasized (at 8, 10, 16) the need for the President to retain broad discretion to act without judicial interference. The May 1992 Executive Order was issued three full months after this Court denied certiorari in *HRC*, and it responded to a massive new wave of Haitian out migration and the resulting absence of available space in the camps at Guantanamo. See pages 6-7, *supra*. The record thus refutes any suggestion that the government

deliberately concealed an intention to change its policy in an effort to prevent review by this Court.[16]

2. As the court below recognized, "[a] discretionary denial of review * * * does not deprive a ruling of preclusive effect." Pet. App. 13a (citing Restatement (Second) of Judgments § 28 comment a). It follows that the contents of the government's brief opposing discretionary review by this Court of the Eleventh Circuit's judgment in *HRC II* does not deprive that judgment of its binding effect. See Pet. App. 51a (Walker, J., dissenting).

The court of appeals apparently thought that it nevertheless was free to dispense with collateral estoppel in these circumstances on equitable grounds, for it elsewhere recited the proposition that issue preclusion may be inappropriate where "a new determination is warranted in order * * * to avoid inequitable administration of the laws." Pet. App. 11a (quoting Restatement (Second) of Judgments § 28(2)(b), at 273). But that proposition does not give the courts free-roving power to dispense with collateral estoppel whenever they believe it would be "equitable" to do so. Rather, it applies where preclusion would be "inequitable" in the sense of subjecting similarly-situated parties to inconsistent legal regimes, *O'Leary* v. *Liberty Mut. Ins. Co.*, 923 F.2d 1062, 1069-1070 (3d Cir. 1991); *Clark-Cowlitz Jt. Operating Agency* v. *FERC*, 826 F.2d 1074, 1080 n.5 (D.C. Cir. 1987) (en banc); *Staten Island Rapid Transit Operating Auth.* v. *ICC*, 718 F.2d 533, 542 (2d Cir. 1983), and is therefore closely related to the principle that intervening changes in controlling law may make issue preclusion inapplicable. See Restatement

[16] Although the brief in opposition discussed (at 2-3) the screening procedures, that was hardly the focus of the argument against certiorari. The brief explained (at 9, 13-14, 18-20) that the Eleventh Circuit was correct in holding that 8 U.S.C. 1253(h) does not apply to migrants encountered on the high seas and that there was no conflict among the courts of appeals, but it did not contend that the then-current screening policy made the case an inappropriate "vehicle" for this Court's consideration of the statutory issue.

(Second) of Judgments, § 28 comment c, at 276-277; 1B J. Moore, *Federal Practice*, *supra*, ¶ 0.448, at 845, 848; see, *e.g.*, *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 362-363 (1984); *Sunnen*, 333 U.S. at 599. Adherence to collateral estoppel produces no such inequity in this case, because *all* interdicted Haitian migrants continue to be bound by the *HRC II* holding that 8 U.S.C. 1253(h) is inapplicable on the high seas.[17]

3. A novel exception to established preclusion principles based on circumstances surrounding a denial of certiorari would be unsound in any event. This Court does not sit as a court of error; its essential function is to superintend the orderly development of federal law. See Sup. Ct. R. 10.1. Although the Court's certiorari decisions are undoubtedly influenced by additional factors, the primary focus is on the significance of the legal issues presented, rather than the importance of the case to a particular party. Thus, a change in circumstances that were not essential to the prior judgment is unlikely to have significantly affected this Court's decision to grant or deny certiorari. Moreover, an exception based on such considerations would plunge the lower courts into pure speculation and undermine the certainty and repose that preclusion principles are intended to promote .[18]

[17] Nor may federal courts decline to apply issue preclusion simply because the legal question is important or because the correctness of the prior decision is not free from doubt, as the majority below also suggested. Pet. App. 13a-14a; *id.* at 41a (Newman, J., concurring); see *McCurry*, 449 U.S. at 101; 18 C. Wright *et al.*, *supra*, § 4426, at 265 ("If relitigation were permitted whenever it might result in a more accurate determination, in the name of 'justice,' the very values served by preclusion would be quickly destroyed.").

[18] To determine whether a change in circumstances involves facts essential to a prior judgment requires a relatively straightforward inquiry, based on a reading of the earlier court's opinion and an assessment of whether its analysis might have produced a different result if it had been applied to the facts in the second case. See *Montana*, 440 U.S. at 158-162. But because this Court does not typically explain its decisions to deny certiorari, there is no

D. Consistent application of preclusion principles "is central to the purpose for which civil courts have been established," because it protects litigants "from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 153-154. The court of appeals ignored these considerations, explaining only that "[s]ince the dispositive question—whether § 243(h) of the INA applies to conduct of the United States outside of our territorial waters—is one purely of law, few judicial resources would be saved by collaterally estopping these plaintiffs from litigating this issue." Pet. App. 12a-13a. But the course of this litigation—which has replicated the *HRC* experience of a sequence of temporary restraining orders and preliminary injunctions, expedited briefings and hearings, and repeated stay applications to the court of appeals and this Court—belies any notion that the "legal" character of the issues permits them to be resolved without significant adverse effect on the parties, the judicial system, and the national interest.

The United States prevailed in *HRC* after a full and fair hearing, and it was entitled to rely on that decision and avoid reinstatement of intrusive injunctions of the kind that the Eleventh Circuit set aside. Had the plaintiffs prevailed in *HRC II*, the government could hardly have escaped the preclusive effect of that judgment by eliminating refugee screening and announcing that a new interdiction program was in effect. It is no more just or

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comparably reliable means of determining what factual alterations might have induced the Court to grant review. See *Singleton* v. *Commissioner*, 439 U.S. 940, 942-946 (1978) (Stevens, J., respecting the denial of certiorari). Moreover, an exception to collateral estoppel that attached significance to non-essential facts before the Court when certiorari was denied would encourage litigants to file meritless certiorari petitions in the hope of forestalling application of collateral estoppel in subsequent cases.

equitable to invoke that rationale to permit the plaintiffs to relitigate an issue previously resolved against them.

III. 8 U.S.C. 1253(h) DOES NOT APPLY TO ALIENS OUTSIDE THE UNITED STATES

If the Court reaches the merits, it should reverse the court of appeals' holding that 8 U.S.C. 1253(h) prohibits implementation of the President's policy of repatriating interdicted Haitian migrants directly to Haiti. Section 1253(h) has no application to aliens outside the United States.

Section 1253(h) must be construed in light of the "long-standing principle of American law" that an Act of Congress is presumed "to apply only within the territorial jurisdiction of the United States" unless there is a "clearly expressed," "affirmative intention" by Congress to the contrary. *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991) (quoting *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949), and *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)). That is especially so where, as here, it is contended that the Act confers a right on *aliens* outside the United States, *Arabian American Oil*, 111 S. Ct. at 1234; *Foley Bros.*, 336 U.S. at 286—indeed, a right enforceable against the United States in United States courts. The presumption bars application of federal statutes to the high seas as well as foreign countries, for "[w]hen it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute." *Arabian American Oil*, 111 S. Ct. at 1235 (quoting *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989)). The requirement of a "clear statement" to that effect "assure[s] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved" in extending the statute beyond our borders. *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2170 (1991).

The presumption against extraterritoriality is powerfully reinforced here by the principle that statutes should

be construed so as not to interfere with foreign policy, *Weinberger* v. *Rossi*, 456 U.S. 25, 31-32 (1982); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19 (1963); *Benz*, 353 U.S. at 147, or with the constitutional responsibilities and prerogatives of the President, *Franklin*, 112 S. Ct. at 2775-2776; *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 465-467 (1989); *Waterman Steamship Corp.*, 333 U.S. at 110-112. Furthermore, as this Court has repeatedly held, the power to exclude aliens, or to admit them on specified conditions, is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers." *Kleindienst* v. *Mandel*, 408 U.S. 753, 765 (1972); see also *Landon* v. *Plasencia*, 459 U.S. 21, 33 (1982); *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977); *Knauff*, 338 U.S. at 542; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 707-709 (1893); *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659-660 (1892). In the absence of a clear statement, an Act of Congress should not be construed to interfere with that fundamental attribute of sovereignty by barring measures undertaken by the President, pursuant to express statutory authorization, to prevent illegal entry of aliens.

In this case, there is no affirmative indication whatever —much less a "clear statement"—that Congress intended 8 U.S.C. 1253(h) to apply to all actions of the U.S. Government outside the United States, and thereby to confer on aliens anywhere in the world who are attempting illegal entry into the United States a right to avoid repatriation. Nor is there any indication that Congress "faced" the "critical matters involved," *Solimino*, 111 S. Ct. at 2170, in conferring such a right on aliens outside the United States that can be enforced in U.S. courts against the Executive Branch officials responsible for the operation of military vessels on the high seas pursuant to orders of the President. To the contrary, the conclusion that Section 1253(h) applies only to aliens who are physically present in the United States is supported by:

(a) the text of Section 1253(h) and the structure of the INA as a whole; (b) the parallel scope of Article 33 of the U.N. Convention Relating to the Status of Refugees, as reflected in its text, negotiating history, ratification, implementation, and formal interpretations by the State Department; and (c) the legislative history of the 1980 amendments to Section 1253(h).

A. The Text Of Section 1253(h) And The Structure of The Act Establish That Section 1253(h) Does Not Apply To Aliens Outside The United States

Nothing in the text of the INA supports the court of appeals' holding that 8 U.S.C. 1253(h) applies to actions of the Coast Guard or other Executive officials in carrying out the President's interdiction policy on the high seas.

1. a. Paragraph (1) of Section 1253(h) provides:

> The Attorney General shall not deport or return any alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

By its terms, this provision applies to actions of the Attorney General. That is not surprising, because Section 1253(h) is located in the part of the INA that is concerned with procedures for removing aliens from the United States (INA Part V, 8 U.S.C. 1251-1260)—a matter for which the Attorney General is responsible. See 8 U.S.C. 1103; pages 35-36, *infra*. Neither Section 1253(h) nor any provision of Part V of the INA makes any mention of actions by the Coast Guard or any other agency that might encounter a potential refugee on the high seas or elsewhere outside the territory of the United States. Thus, even without regard to the presumption against extraterritoriality, the most natural reading of paragraph (1) of Section 1253(h) is that it bars the Attorney General from sending an alien *from* the United States *to* a foreign country in the specified circumstances.

b. Moreover, Section 1253(h) is triggered only "if the Attorney General determines" that the alien would be threatened with persecution. Cf. *Webster* v. *Doe*, 486 U.S. at 600. The Attorney General has made no such determination regarding Haitian interdictees who might be repatriated pursuant to the President's 1992 Executive Order, because the President decided that determinations concerning Haitians who want to enter the United States as refugees will now be made at our Embassy in Haiti, pursuant to 8 U.S.C. 1157. That policy decision comports with the text of Section 1253(h) and with the overall statutory scheme (of which Section 1253(h) is a part) that Congress established in 1980 to address refugee problems.

Section 1253(h) does not in itself either require the Attorney General to determine whether a particular alien would be subject to persecution in another country, or specify where or when such a determination must be made. Nor does it provide for the receipt of applications from aliens seeking relief. That is because other sections of the INA specify when and how such determinations must be made—and those sections confirm that the determinations referenced in Section 1253(h) are to be made only with respect to aliens in the United States.

The asylum provision of the INA, 8 U.S.C. 1158, specifically directs the Attorney General to "establish a procedure *for an alien physically present in the United States or at a land border or port of entry*, irrespective of such alien's status, to apply for asylum"; and it then provides that the Attorney General may, in his discretion, grant the alien asylum "if [he] determines" that the alien is a refugee within the meaning of the INA. 8 U.S.C. 1158(a) (emphasis added). This Section of the INA thus addresses the subject of refugee status for those aliens who have reached our shores. Under implementing INS regulations, an asylum application is deemed also to constitute an application for withholding of deportation under 8 U.S.C. 1253(h), which, if granted, would bar the subsequent removal of the alien from the United States

(either by deportation or exclusion) to a country in which he would be threatened with persecution. 8 C.F.R. 208.3(b), 208.16; see *INS* v. *Doherty*, 112 S. Ct. 719, 725 n.6 (1992); see also 8 U.S.C. 1252(b) (requiring the Attorney General to adopt procedures necessary to determine deportability of aliens in the United States). But nothing in the INA or implementing regulations provides for receipt of applications for asylum or withholding of deportation from aliens *outside* the United States who claim to be refugees.

Measures regarding refugees outside the United States are instead governed by 8 U.S.C. 1157. The admission of refugees under that Section is committed to the discretion of the President, who—after consultation with Congress, 8 U.S.C. 1157(d) and (e), and considering the "foreign policy interests of the United States," 8 U.S.C. 1157(e)(6)—establishes the total number of refugees to be admitted annually and allocates that quota among refugees from various regions and categories. 8 U.S.C. 1157(a). Within those allocations, the Attorney General then is authorized, in his discretion, to admit individual refugees who are determined to be "of special humanitarian concern to the United States." 8 U.S.C. 1157(c)(1). Implementing INS regulations provide for the filing of applications for admission with the overseas INS officer responsible for the geographic area in which the alien is located, 8 C.F.R. 207.1(a), 207.3, and for waiting lists and priority handling to assure orderly processing. 8 C.F.R. 207.5.

In contrast to the asylum regime established under 8 U.S.C. 1158 for aliens in the United States or at our borders, neither 8 U.S.C. 1157 nor implementing regulations provides for treating an application for discretionary refugee admission under Section 1157 as an application for withholding of deportation or return under Section 1253(h). That is because the *mandatory* relief afforded by Section 1253(h) is available only to aliens who are physically present in the United States. Congress made refugee policy concerning aliens on the high seas and elsewhere outside the United States *discretionary* with

the President under 8 U.S.C. 1157. The court of appeals' holding that Section 1253(h) applies to Haitian interdictees on the high seas thus is inconsistent with the framework established by the INA for addressing refugee problems.

c. The only textual basis the court of appeals cited for its contrary reading of Section 1253(h) was the reference in paragraph (1) to "any alien." In the court's view, that reference made it "plain" and "unambiguous" that Section 1253(h) applies to aliens outside the United States, because "aliens are aliens, regardless of where they are located." Pet. App. 16a; see also *id.* at 17a, 21a, 23a. The court's reasoning was both superficial and wrong. This Court made clear in *Foley Bros.* that such general references to the subject of the statute's regulation—without any further provision expressly giving that regulation an extraterritorial reach—do *not* overcome the presumption against extraterritoriality. Thus, in *Foley Bros.*, the Court held that a statute requiring an eight-hour day provision in "[e]very contract made to which the United States * * * is a party" was inapplicable to contracts for work performed in a foreign country. 336 U.S. at 282. In light of the premise that Congress "is primarily concerned with domestic conditions," *Arabian American Oil*, 111 S. Ct. at 1230, the term "any alien" in 8 U.S.C. 1253(h) (like the term "every contract" in the statute in *Foley*) must be understood to refer only to those in the United States.[19] See also *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2150 n.4 (1992) (Stevens, J., concurring in the judgment) (Endangered Species Act's requirement that "[e]ach Federal agency" shall insure that "any action" it funds or carries out does not jeopardize "any" protected species "is

[19] Other provisions of the INA likewise use the phrase "any alien," without any basis for including aliens outside the United States. See, *e.g.*, 8 U.S.C. 1252(b) ("special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien").

not sufficient to overcome the presumption against the extraterritorial application of statutes").[20]

The court of appeals also found it significant that the INA defines "alien" to mean "any person not a citizen or national of the United States." See Pet. App. 16a (quoting 8 U.S.C. 1101(a)(3)). That definition, however, merely identifies *who* is potentially covered by the INA; it does not specify *where* any particular provision of the INA applies. Moreover, the court of appeals' reliance on the statutory definition is foreclosed by *Arabian American Oil*. There, the Court held that the broad definitions of "employer," "commerce," and "industry affecting commerce" in 42 U.S.C. 2000e(b), (g) and (h) were insufficient to extend Title VII of the Civil Rights Act of 1964 beyond the territory of the United States. In so ruling, the Court reiterated its prior holdings that even where an Act of Congress has broad definitional or jurisdictional provisions, it must be interpreted to apply only to domestic conduct in the absence of "specific language" to the contrary, *McCulloch*, 372 U.S. at 19—*i.e.*, in the absence of "words which definitely disclose an intention to give it extraterritorial effect," *New York Central R.R.* v. *Chisholm*, 268 U.S. 29, 31 (1925). See 111 S. Ct. at 1232. The words "any alien" simply do not satisfy that standard. Neither the court of appeals nor respondents have identified any other "specific language" in paragraph (1) of Section 1253(h) (or elsewhere in the INA) that

[20] The court of appeals stated that the presumption against extraterritorial application "has no relevance in the present context." Pet. App. 17a. The court reasoned that the presumption "is a canon of construction " 'whereby *unexpressed* congressional intent may be ascertained,' " while here, in its view, Congress extended Section 1253(h) to the high seas by applying it to "any alien." *Ibid.* (quoting *Foley Bros.*, 336 U.S. at 285) (emphasis added). The court of appeals got it backwards. The presumption is not irrelevant in this case; it is the starting point of analysis. The general reference to "any alien" plainly does not constitute the sort of specific expression of congressional intent that is necessary to overcome the presumption against extraterritoriality.

"definititely disclose[s]" an intention to apply Section 1253(h) to aliens beyond our borders—and, in particular, to limit the authority of the President to order repatriation of aliens interdicted on the high seas.[21]

2. Paragraph (2) of Section 1253(h), which carves out exceptions to the prohibition in paragraph (1), confirms that Section 1253(h) applies only to aliens in the United States. Of particular relevance here, paragraph (2)(C) provides that withholding of deportation or return is not available to an "alien [who] has committed a serious nonpolitical crime outside the United States *prior to the arrival of the alien in the United States*" (emphasis added). This exception presupposes that the alien involved has arrived "in the United States." Two other exceptions likewise refer to the "United States," expressing a determination to protect the "community of the United

[21] After concluding that Section 1253(h) applies to Haitian interdictees who have never arrived at our borders, the court of appeals held that repatriation of such interdictees without screening violates that Section's prohibition against "deport[ing] or return[ing]" an alien to a country where he is threatened with persecution. The court recognized that the word "deport" applies only to an alien who is already in the United States, Pet. App. 20a, but it believed that "return" covers the present situation because it means "to bring, send, or put (a person or thing) back to or in a former position." Pet. App. 22a (quoting *Webster's Third New International Dictionary* 1941 (1976)). The court's definition of "return" adds nothing to its conclusion, because that definition is also fully consistent with our interpretation: the Attorney General may not "send" an alien *from* the United States "back" to Haiti if he would be threatened with persecution there.

The court of appeals also found it significant that although the word "return" in Section 1253(h) is followed by the phrase "to a country [where he would be threatened with persecution]," Congress "made no mention of where the alien (who may be anywhere, within or without the United States) must be returned 'from.'" Pet. App. 22a (brackets added by court). This reasoning, too, was seriously flawed. The phrase "to a country * * *" modifies "deport" as well as "return," and "deport" indisputably refers to removal of an alien *from* the United States. In any event, such negative inferences are insufficient to overcome the presumption against extraterritoriality. *Arabian American Oil*, 111 S. Ct. at 1231-1232, 1233-1234.

States" and "security of the United States" from the presence of undesirable aliens. See 8 U.S.C. 1253(h)(2)(B) and (D). There is, by contrast, no mention in paragraph (2) (or paragraph (1)) of aliens beyond our borders. Compare *Arabian American Oil*, 111 S. Ct. at 1234 (similarly noting Title VII's mention of "states" but not foreign nations). Thus, Section 1253(h)'s "only geographic reference[s]," *Defenders of Wildlife*, 112 S. Ct. at 2150 (Stevens, J., concurring in the judgment), confirm its domestic focus.

3. The interpretation of Section 1253(h) evident from its terms is also compelled by the statutory context in which it appears. Section 1253(h) is located in Part V of the INA, 8 U.S.C. 1251-1260, which prescribes standards and procedures for expelling aliens from the United States. Section 1251, entitled "Deportable aliens," identifies which aliens are subject to expulsion. It begins by stating that "[a]ny alien *in the United States* * * * shall, upon the order of the Attorney General, be deported," if he falls within any of a number of enumerated categories. 8 U.S.C. 1251(a) (emphasis added). Section 1252, entitled "Apprehension and deportation of aliens," then provides for arrest and detention of the alien; deportation proceedings before a special inquiry officer; a final order of deportation; and removal of the alien "from the United States" by the Attorney General. 8 U.S.C. 1252(a)-(c).

Section 1253, in turn, is entitled "Countries to which aliens shall be deported." Its inapplicability to aliens outside the United States is established by subsection (a), which states that "[t]he deportation of an alien *in the United States* * * * shall be directed by the Attorney General," either to a country designated by the alien that is willing to accept him or to another country. 8 U.S.C. 1253(a) (emphasis added); see *Doherty*, 112 S. Ct. at 722. Subsection (h) of 8 U.S.C. 1253, at issue here, simply places a limitation on the countries (specified in subsection (a)) to which the Attorney General may send an alien who is unlawfully "in the United States."

In sum, the text and structure of Part V of the INA as a whole (see *McCarthy* v. *Bronson*, 111 S. Ct. 1737, 1740 (1991)) refute the notion that Section 1253(h) confers a free-standing right upon aliens anywhere in the world. See also *HRC II*, Pet. App. 215a; *HRC* v. *Gracey*, 600 F. Supp. 1396, 1404 (D.D.C. 1985), aff'd on other grounds, 809 F.2d 794 (D.C. Cir. 1987).

B. The Limited Territorial Reach Of Section 1253(h) Is Confirmed By The Comparably Limited Reach Of Article 33 Of The United Nations Convention Relating to The Status Of Refugees, After Which Section 1253(h) Was Patterned

The limited territorial scope of Section 1253(h) is also supported by the parallel scope of Article 33 of the U.N. Convention Relating to the Status of Refugees. As this Court has noted, Section 1253(h) was revised by the Refugee Act of 1980, Pub. L. No. 99-912, § 203(e), 94 Stat. 107, to conform its language to Article 33. See *INS* v. *Stevic*, 467 U.S. 407, 421 (1984); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428-429, 436-437, 440 n.25 (1987); H.R. Rep. No. 608, 96th Cong., 1st Sess. 18 (1979); H.R. Conf. Rep. No. 781, 96th Cong., 2d Sess. 20 (1980).

In the preamble to his May 1992 Executive Order, the President, in accordance with the considered opinions of the Attorney General and the Secretary of State (Pet. App. 30a-31a; see J.A. 201-223), formally set forth his interpretation that the terms of Article 33 "do not extend to persons located outside the territory of the United States" (J.A. 376). This interpretation by the Executive is entitled to "great weight." *United States* v. *Stuart*, 489 U.S. 353, 369 (1989); *Sumitomo Shoji America, Inc.* v. *Avagliano* 457 U.S. 176, 184-185 (1982); *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961). It also respects the fundamental right of the respective Contracting States—inherent in their sovereignty and "[i]n accord with ancient principles of international law of nation states," *Kleindienst* v. *Mandel*, 408 U.S. at 753—to exclude aliens. See also *Nishimura Ekiu*, 142 U.S. at 659-660; L.

Oppenheim, *International Law* 675-676 (Lauterpacht 8th ed. 1955). Just as 8 U.S.C. 1253(h) should not be construed to dispense with that sovereign right on the part of the United States alone in the absence of the clearest expression of congressional intent (see page 28, *supra*), so too Article 33 of the U.N. Convention should not be construed to dispense with that sovereign right on the part of the Contracting States generally, in the absence of the clearest expression of agreement among them to do so. Cf. *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52-53 (1986) (contracts construed to avoid foreclosing exercise of sovereign authority).[22]

There is no evidence that the Contracting States agreed to extend Article 33 to the high seas and elsewhere throughout the world.[23] Indeed, the President's contrary interpretation is supported by: (1) the text of Article 33 and the Convention as a whole, (2) its negotiating history, (3) the United States' accession to the Convention, (4) Congress's understanding when it implemented Article 33 in 1980, and (5) subsequent international negotiations and

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[22] In contrast to the U.N. Refugee Convention, agreements concerning refugee seamen obligate a contracting party to admit a refugee in certain circumstances. See Hague Agreement Relating to Refugee Seamen, Nov. 23, 1957, 506 U.N.T.S. 126; Hague Protocol Relating to Refugee Seamen, June 12, 1973, 965 U.N.T.S. 445. Those agreements, which cross-reference the U.N. Refugee Convention and Protocol, are concerned with seamen who are not entitled to admission to the territory of any State other than a State where they have a well-founded fear of persecution. See 2 D.P. O'Connell, *The International Law of the Sea* 790-791 (1984).

[23] Nations have demonstrated that they know how to place the high seas within the reach of a treaty when they desire to do so. Compare *Arabian American Oil*, 111 S. Ct. at 1235 (quoting *Argentine Republic*, 488 U.S. at 440). See, *e.g.*, Geneva Convention on the High Seas, Apr. 29, 1958, [1962] 13 U.S.T. 2312, T.I.A.S. No. 5200; U.N. Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261. The U.N. Refugee Convention contains no comparable provisions that render Article 33 applicable to aliens encountered on the high seas.

the Department of State's construction of the Convention.[24]

1. a. Article 33 contains no express statement or other affirmative indication that it was intended to impose obligations on a Contracting State outside its own territory. Paragraph 1 of Article 33 provides that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of a territory where his life or freedom would be threatened" on account of his political opinion. The most natural reading of this language is that it expresses an essentially unitary prohibition against removal of a refugee *from* the "Contracting State" *to* a foreign territory in the specified circumstances, irrespective of the manner in which the removal might be accomplished. The prohibition against "expelling" plainly has in mind a refugee who is within the territory of the Contracting State. The succeeding phrase rounds out that prohibition by providing that a refugee is likewise not to be sent ("return[ed]") from the Contracting State to the foreign territory in any *other* "manner". This reading is consistent with the French word "refouler," which immediately follows (and defines) "return" in paragraph 1. Significantly, one meaning of "refouler"—a meaning specifically relevant to this case—is "expel

[24] Even if Article 33 did apply to aliens outside the United States, it would not afford them any privately enforceable rights. In its June 10 decision, the Second Circuit correctly recognized that the U.N. Protocol (including its incorporation of Article 33) is not judicially enforceable because the Protocol does not grant rights beyond those afforded by domestic law. See Pet. App. 110a n.13. This holding by the court below was consistent with its own prior rulings, see *Bertrand* v. *Sava*, 684 F.2d 204, 218-219 (1982); *Chim Ming* v. *Marks*, 505 F.2d 1170, 1172 (1974), aff'g 367 F. Supp. 673, 677-679 (S.D.N.Y. 1973), as well as those of every other court of appeals that has considered the question, including the Eleventh Circuit in *HRC II*. See Pet. App. 173a; *United States* v. *Aguilar*, 883 F.2d 662, 680 (9th Cir. 1989), cert. denied, 111 S. Ct. 751 (1991); *Pierre* v. *United States*, 547 F.2d 1281, 1289 (5th Cir.), vacated on other grounds, 434 U.S. 962 (1977); see also *Gracey*, 600 F. Supp. at 1401, 1406.

(aliens)." *Cassell's French Dictionary* 627 (1978). Under this meaning, "return ('refouler')," like "expel," connotes ejection of an alien from within the territory of the Contracting State.

The court of appeals rejected this interpretation because it believed that it would render the term "return ('refouler')" redundant by effectively revising Article 33.1 to forbid a Contracting State to "expel or expel" an alien. Pet. App. 29a. The court was wrong. Insertion of the French word "refouler" after "return" in the English text demonstrates that the latter is used as a term of art. Although its meaning is similar to that of "expel," the two terms are not identical. As the background and negotiating history of the Convention show (see pages 42-44, *infra*)—and as the court of appeals in fact acknowledged (Pet. App. 29a)—"expel" likewise is a term of art in this setting, referring to the formal process for removing an alien who was lawfully admitted to the country. See *ibid.* (discussing Article 32, which restricts the authority of Contracting States to "expel a refugee lawfully in their territory"). Refoulement, by contrast, connotes "summary reconduction" (mere physical relocation) of an individual. G. Goodwin-Gill, *The Refugee in International Law* 69 (1983). Thus, as the court of appeals itself pointed out, refoulement is "to be *distinguished* from expulsion or deportation, the more formal process whereby a lawfully resident alien may be required to leave a state, or be forcibly ejected therefrom." Pet. App. 29a (quoting G. Goodwin-Gill, *supra*, at 69) (emphasis added).

By the court's own reasoning, then, "expel" and "return ('refouler')" are *not* redundant under our interpretation of Article 33. Rather, they describe two different ways in which an alien might be physically removed from the Contracting State's territory, and they make clear that Article 33 (unlike, *e.g.*, Articles 26, 28, and 32) applies equally to individuals who have been lawfully admitted and those who are in the State's territory but not yet lawfully admitted. By the same token, as the court of appeals also

recognized (Pet. App. 29a), its interpretation of "return ('refouler')" to include repatriation of an alien from anywhere in the world would render superfluous the prohibition against "expel[ling]" an alien to a foreign country where he is threatened with persecution, because the latter action would in any event be barred by the all-encompassing prohibition against "return" of the alien to such a country.[25]

b. Our interpretation of paragraph 1 of Article 33 is confirmed by paragraph 2, which states that the benefit of Article 33 may not be claimed by a refugee who is a danger to the security of "the country in which he is." This paragraph, which is the only territorial reference in the

[25] The court of appeals also cited respondents' reliance on other meanings of the French word "refouler," such as "drive back" or "repulse." Pet. App. 28a; see Resp. C.A. Br. 17 (citing M. Dubois, *Dictionnaire Larousse* 631 (1981)). Unlike the definition on which we rely ("expel (aliens)"), however, those definitions do not specifically relate to the subject of this case. In any event, the existence of several French definitions is fatal to the court's conclusion (Pet. App. 26a, 29a) that the "plain language" of Article 33.1 compels the interpretation it adopted and forecloses consideration of the negotiating history. See *Eastern Airlines, Inc.* v. *Floyd*, 111 S. Ct. 1489, 1497-1499 (1991) (looking to negotiating history to ascertain meaning of French text).

Moreover, in quoting these alternative definitions below, respondents apparently intended to argue that the term "return ('refouler')" prohibits a contracting State from rejecting an alien who has arrived at its borders, while "expel" prohibits ejection of an alien from within its borders. There are at least three problems with this argument. First, it is inconsistent with respondents' primary argument (that the term "return" applies to the Contracting State wherever it may act), which would extend Article 33 far beyond rejection of those aliens who arrive at the State's own borders. Second, the negotiating history shows that the drafters specifically rejected respondents' alternative interpretation of "return," in order to ensure that Article 33.1 would *not* require a Contracting State to permit a mass influx of refugees across its borders. See pages 42-44, *infra*. Third, Article 33.1 would be inapplicable in this case even if "return ('refouler')" were interpreted to mean to "drive back" or "repulse" aliens from the Contracting State's borders, because the Haitian migrants interdicted off the coast of Haiti are not at the borders of the United States.

Article, contemplates that a refugee is covered only if he is "in" a "country" of refuge. Thus, read as a whole, Article 33 applies only to a refugee who is within the territory of a Contracting State. See, *e.g.*, *Air France* v. *Saks*, 470 U.S. 392, 397-400 (1985) (construing together the liability provisions of the Warsaw Convention).

c. The text and structure of the Convention as a whole lend further support to this interpretation. As the court of appeals acknowledged (Pet. App. 26a-27a), the premise that the Convention is limited to the territory of the Contracting State is woven throughout its provisions. See Arts. 4, 15, 17.1, 18, 19.1, 21, 23, 24, 26, 27, 28, 31.1, 32.1.[26] Moreover, Article 40.1 (entitled "Territorial Application Clause") provides that a State may, at the time of signature, ratification, or accession, "declare that this Convention shall *extend* to all or any of the territories for the international relations of which it is responsible" (emphasis added). Accordingly, Article 40.1 indicates that a Contracting State's obligations under Article 33 do not automatically extend beyond its metropolitan territory even to its territories or possessions, much less to the high seas and throughout the entire world, as the court of appeals held. See Pet. App. 67a (Walker, J., dissenting).[27]

d. The court of appeals erroneously relied on language in Article 1.3 of the Protocol stating that the Protocol "shall

[26] See also Art. 1.F.b (emphasis added) (excluding from the Convention's protections any person with respect to whom there are serious reasons for considering that "he has committed a serious non-political crime outside the country of refuge *prior to his admission to that country as a refugee*"). Compare 8 U.S.C. 1253(h)(2)(C), discussed at pages 34-35, *supra*.

[27] Paragraph 2 of Article 40 permits a Contracting State to extend the Convention to other territories after it ratifies or accedes to the Convention, subject, where necessary, to the consent of the governments of those other territories; and paragraph 3 encourages Contracting States to do so. Numerous declarations of territorial application have been filed with the Secretary General of the U.N. under Article 40. See U.N., *Multilateral Treaties Deposited With the Secretary General: Status as of December 30, 1990*, at 210-211 (1991).

be applied by the States Parties hereto without any geographic limitation." Pet. App. 28a (quoting 19 U.S.T. at 6225). As is evident from the remainder of the quoted sentence (which the court omitted), the "geographic limitation" to which Article 1.3 of the Protocol refers is the one contained in the definition of the term "refugee" in Article 1 of the 1951 Convention, which permitted a Contracting Party either to limit its obligations to refugees from Europe, or to extend them to refugees from elsewhere as well.[28] It is, by contrast, Article 7.4 of the Protocol (which carries forward some features of Article 40 of the Convention) that addresses the "territorial" scope of the Contracting State's obligations.[29]

2. Any lingering doubt on the extraterritoriality issue is dispelled by the official minutes of the Conference of Plenipotentiaries that adopted Article 33 in the form in which it was ratified. The Swiss delegate expressed the view at one session of the Conference that "expel" "related to a refugee who had already been admitted to the territory

[28] The Convention also limited the term "refugee" to persons who satisfied the definition as a result of events occurring before January 1, 1951. See Arts. 1.A, 1.B. Article 1.2 of the Protocol defines "refugee" to have the same meaning as under Article 1 of the Convention, but without the 1951 cut-off date. Article 1.3 of the Protocol then provides that the Protocol shall be applied by States parties "without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article 1B(1)(a) of the Convention, shall, unless extended under article 1B(2) thereof, apply also under the present Protocol." As a result of Article 1.3 of the Protocol, nations that were parties to the 1951 Convention could, when they ratified the Protocol, maintain any limitations they had previously declared on the geographic area-of-origin of the refugees to whom they assumed obligations; but nations that adhere to the Convention only by becoming parties to the Protocol may not limit their obligations in that manner.

[29] Article 7.4 provides that declarations of territorial application made by a State pursuant to paragraphs 1 and 2 of Article 40 of the Convention shall be deemed to apply to the Protocol as well, and that paragraghs 2 and 3 of Article 40 "shall be deemed to apply *mutatis mutandis* to the present Protocol."

of a country," while "return" related to "refugees who had already entered a country but were not yet resident there." Conference of Plenipotentiaries, *Summary Record of the 16th Meeting*, U.N. Doc. A/CONF.2/SR.16, at 6 (July 11, 1951). The representatives of France, Belgium, Germany, Italy, the Netherlands, and Sweden agreed. *Id.* at 6, 11-12. At a subsequent session, the Dutch delegate reiterated the Swiss interpretation of "expulsion" and " 'return' ('*refoulement*')," and he stated that based on his intervening conversations with other representatives as well, there appeared to be a "general consensus" in favor of it. *Id., 35th Meeting*, U.N. Doc. A/CONF.2/SR.35, at 21 (July 25, 1951). The Dutch delegate then asked to have the record show that the Conference was in agreement with this interpretation, "[i]n order to dispel any possible ambiguity" and to ensure that "mass migrations across frontiers or * * * attempted mass migrations"—the precise context of this case—are "not covered by article 33." *Ibid.* "There being no objection," the President of the Conference ordered that interpretation "placed on record." *Ibid.* The President further suggested that "refouler" be placed in brackets after "return" every place the latter word appears in the English text, and that suggestion was "adopted unanimously." *Id.* at 21-22. See J.A. 224-230.

On this record, the word "refouler" in paragraph 1 of Article 33 can only be understood to embody a deliberate decision by the Contracting States (including the United States[30]) to incorporate the territorial limitation we urge into the text of the Convention. Pet. App. 63a-66a (Walker, J., dissenting); see also *Gracey*, 809 F.2d at 840 & nn.132, 133 (Edwards, J., concurring and dissenting).[31] Commen-

[30] The United States' delegate was present at the July 11 and 25 sessions. U.N. Doc. A/CONF.2/SR.16, at 2; U.N. Doc. A/CONF. 2/SR.35, at 2.

[31] The background of the Convention lends still further support to this conclusion, as explained in Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* 160-163 (1953). As Robinson noted (at 162), an important study

tators, including the former United Nations High Commissioner for Refugees, have read Article 33 in the same manner. See Aga Khan, *Legal Problems Relating to Refugees and Displaced Persons*, 149 Recueil des Cours (Hague Academy of Int'l Law) 287, 318 (1976).[32]

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published by the United Nations in 1949 as a prelude to the Convention had used the term "expulsion" to mean "the juridical decision taken by the judicial or administrative authorities whereby an individual is ordered to leave the territory of the country." U.N. Dep't of Social Affairs, *A Study of Statelessness* 60 (1949). By contrast, the *Study* had used the term "reconduction" (which it regarded as the equivalent of "refoulement") to mean "the mere physical act of ejecting from the national territory a person who has gained entry or is residing therein irregularly," and *not* "to signify the act of preventing a foreigner who has presented himself at the frontier from entering the national territory." *Id.* at 60 & n.1. Robinson, too, regarded "reconduction" to be "the equivalent of 'refoulement,'" and he noted that reconduction "was changed by the Ad Hoc Committee [on Statelessness, which prepared the first draft of the Convention,] to the word 'return.'" Robinson, *supra*, at 162; see *Report of the Ad Hoc Comm. on Statelessness and Related Problems*, U.N. Doc. E/AC.32/5, at 7 (Draft Convention Art. 28) (Feb. 17, 1950). This background reinforces our submission that Article 33.1 states what is essentially a unitary prohibition against a Contracting State's ejection of a refugee from its territory, whatever the means and whatever the legal status of the refugee. See pages 38-39, *supra*.

[32] See also Robinson, *supra*, at 160-163; 2 A. Grahl-Madsen, *The Status of Refugees in International Law* 94 (1972); Hailbronner, *Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?*, 26 Va. J. Int'l L. 857, 861-862 (1986); Chooi Fong, *Some Legal Aspects of the Search for Admission Into Other States*, 1981 Brit. Y.B. Int'l L. 53, 69; Weis, *The United Nations Declaration on Territorial Asylum*, 7 Can. Y.B. Int'l L. 92, 123-124 (1969); Pugash, *The Dilemma of the Sea Refugee: Rescue Without Refuge*, 18 Harv. Int'l L. J. 577, 591 (1977); Note, *The Right of Asylum Under United States Law*, 80 Colum. L. Rev. 1125, 1126-1127 (1980).

Even Goodwin-Gill, who advocates that the principle of non-refoulement be given a broader scope that would include non-rejection at the frontier, acknowledges that the negotiating history of the 1951 Convention is inconsistent with that view. See G. Goodwin-Gill, *supra*, at 74 ("At the 1951 Conference, no formal objection appears to have been raised to the Swiss interpretation of *non-refoulement*, limiting its application to those who have already entered state territory."); *ibid.* ("the fact remains that states were not prepared to include in the Convention any article on admission of refugees; *non-refoulement* in the sense of even a limited obligation to allow entry may well have been seen as coming too close to the unwished-for duty to grant asylum").

[33] As the Court explained in *Stevic* and *Cardoza-Fonseca*, although withholding of deportation under Section 1253(h) was then discretionary, INS could conform its decisions to Article 33 by

3. The inapplicability of Article 33 to the repatriations challenged here is also reflected in the United States' ratification of the U.N. Protocol, by which this Nation agreed to be bound by Article 33 of the 1951 Convention. The United States became a party to the Protocol on the understanding that our existing immigration laws already provided the protections that Article 33 required, and that Article 33 therefore could be implemented through Section 1253(h) as it then existed. *Stevic*, 467 U.S. at 417-418. That understanding, and the domestic focus of the Convention's provisions affording protections and rights to refugees, were reflected in the President's Letter of Transmittal to the Senate. The President stated that "most refugees *in this country* already enjoy the protection and rights which the Protocol seeks to secure for refugees *in all countries*," and that "[a]ccession to the Protocol would not impinge adversely upon established practices under existing laws *in the United States*." Exec. K, 90th Cong., 2d Sess. iii (1968) (emphasis added). The Secretary of State elaborated (*id.* at viii):

> [F]oremost among the rights which the Protocol would guarantee to refugees is the prohibition (under Article 33 of the Convention) against their expulsion or return to any country in which their life or freedom would be threatened. This article is comparable to Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1254 [*sic*], and it can be implemented within the administrative discretion provided by existing regulations.[33]

The Foreign Relations Committee expressed a similar view in recommending approval of the Protocol.[34]

Significantly, when Article 33 was ratified on the basis of this understanding, Section 1253(h) expressly applied only to aliens "within the United States," 8 U.S.C. 1253(h) (1976); relying on that phrase, this Court had held that Section 1253(h) did not even apply to aliens who were physically present in the United States but subject to exclusion proceedings. See *Stevic*, 467 U.S. at 415 (citing *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958)); see also *INS* v. *Stanisic*, 395 U.S. 62, 71 (1969). *A fortiori*, Haitian migrants affected by the President's May 1992 Executive Order, who are altogether outside the United States, enjoy no rights under Article 33 as it was ratified. See *Gracey*, 809 F.2d at 841 (Edwards, J., concurring and dissenting).[35]

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exercising its discretion in favor of withholding where the standards in Article 33 were met. See 467 U.S. at 429 n.22; 480 U.S. at 429.

[34] S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 2 (1968) ("It is understood that the protocol would not impinge adversely upon the Federal and State laws of this country."); see also 114 Cong. Rec. 29,391 (1968) (Sen. Mansfield) (same); *id.* at 27,757 (Sen. Proxmire).

[35] The State Department witness who testified at the Senate hearing similarly described the Protocol as "a universal covenant designed to secure necessary protection *in asylum countries* for those fleeing from their homelands because of persecution, and also, importantly, those rights which are necessary to their re-establishment as self-supporting members of other societies." S. Exec. Rep. No. 14, *supra*, at 4; see also *ibid.* (emphasis added) ("refugees *in the United States* have long enjoyed the protection and the rights which the protocol calls for, on at least a basis equal to that which signatories to the protocol would undertake to implement for refugees *within their respective territories*"); *id.* at 6 (accession to the Protocol "does not in any sense commit the Contracting State to enlarge its immigration measures for refugees"); *id.* at 10 ("there is nothing in this protocol which implies or puts any pressure on any contracting state to accept additional refugees as immigrants"); *id.* at 16 (noting that the United Kingdom had not filed a declaration under the "territorial clause" of the Convention (Article 40) making it applicable to refugees from China who were in Hong Kong); *id.* at 19 (it is "absolutely clear" that "nothing

4. The territorial limitation on application of Article 33 was recognized not only at the time of the United States' accession to the Protocol, but also when Congress amended Section 1253(h) as part of the Refugee Act of 1980. As noted above, Section 1253(h) was amended primarily to conform its language to that of Article 33 of the Convention, and thus to carry it into effect in U.S. law. See page 36, *supra*. It therefore is significant that the legislative history of the 1980 Act shows that Congress understood the Convention to apply only to "refugees *within the territory of the contracting states*." H.R. Rep. No. 608, *supra*, at 17 (emphasis added).[36]

5. Subsequent events confirm that Article 33 applies only to aliens within the territory of the Contracting State.

a. This understanding is reflected first in international efforts, subsequent to the Protocol, to draft a convention on territorial asylum. Compare *Eastern Airlines*, 111 S. Ct. at 1499-1500. Those efforts were preceded by the U.N. General Assembly's adoption of a non-binding Declaration on Territorial Asylum. Article 3(1) of that Declaration provided that no person who is entitled to seek and enjoy asylum from persecution "shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State in which he may be subjected to persecution." G.A. Res. 2312, 22 U.N. GAOR Supp. (No. 16) at 31, U.N. Doc. A/6716 (1967). This text makes clear that the prohibition against expulsion and

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in the protocol * * * requires the United States to admit new categories or numbers of aliens").

[36] The President's 1968 Letter of Transmittal and the Secretary of State's accompanying letter concerning the Protocol were made part of the record of the House Hearings on the Refugee Act. See *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 349-353 (1979) [*1979 House Hearings*]; see also *id.* at 335-349, 353-356 (reproducing Convention and Protocol).

return, which was directly parallel to that in Article 33, was to apply only to aliens who had "already entered the territory" of the contracting State. It was well understood that the non-binding prohibition against rejection at the frontier went beyond Article 33 of the Convention. See Weis, 7 Can. Y.B. Int'l L. at 142; accord, Grahl-Madsen, *An International Convention on Territorial Asylum* 33 (2d ed. 1976).

In the mid-1970s, efforts were renewed to draft a convention on territorial asylum. Ultimately, a group of experts established by the General Assembly proposed a draft convention, Article 3 of which again rested on the same territorial premise. It stated: "No person entitled to the benefits of this Convention *who is in the territory of a contracting State* shall be subjected by such contracting State to measures such as *return or expulsion* which would compel him to return to a territory where his life or freedom would be threatened" (emphasis added). Article 3 further provided that a Contracting State shall use its "best endeavors" to ensure that no person will be rejected at its frontiers if there are well-founded reasons to believe that rejection would subject him to persecution. U.N. Group of Experts on the Draft Convention on Territorial Asylum, *Report and Consolidated Text of Articles*, at 16, 34, U.N. Doc. A/AC.174/MISC.3/GE.75-6119 (June 10, 1975) [*Experts' Report*]. Significantly, the initial proposal to reword this provision came from the United States, which took the position that "the principle of non-refoulement * * * should only apply to persons in the territory of a Contracting State." *Id.* at 14.[37]

b. The Secretary of State adopted the same position in the domestic context in a policy memorandum on asylum

[37] Compare Proposal by the Expert of the United States, U.N. Doc. A/AC.174/Informal Working Paper No. 4 (Apr. 29, 1975), in *Documents of the U.N. Group of Experts on the Draft Convention on Territorial Asylum* 80 (1976), with *Experts' Report*, *supra*, at 110-112, 132; see also 1975 *Digest of the United States Practice in International Law* at 156-158.

he transmitted to all federal agencies and published in the Federal Register in January 1972. See 37 Fed. Reg. 3447.[38] There, the Secretary explained that the United States' asylum policy was informed by the 1951 Convention, to which the United States had acceded by ratifying the U.N. Protocol, particularly "its explicit prohibition against the forcible return of refugees to conditions of persecution." *Ibid.* The Secretary explained that "[a]s a party to the Protocol, the United States has an international treaty obligation for its implementation *within areas subject to jurisdiction of the United States*." *Ibid.* (emphasis added). The State Department took the same position in testimony before Congress in 1980.[39] And in 1989, in the specific context of the Haitian interdiction program, the Department formally communicated to Congress its view, based on the text of Article 33, its negotiating history, and the practice of the international community, that Article 33 "extends only to persons who have gained entry into the territory of the Contracting State." *Haitian Detention and Interdiction: Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 36-43 (1989) (statement of Alan J. Kreczko, Deputy Legal Adviser, Dep't of State).[40]

[38] As the administering agency, the views of the State Department are entitled to deference. The reasons for according deference to agency interpretations of domestic statutes have even greater force when it comes to interpretation of treaties, given the importance of addressing foreign policy issues with a single voice. *Curtiss-Wright*, 299 U.S. at 319.

[39] See *The Situation in Liberia, Spring 1980—Update: Hearing Before the Subcomm. on Africa of the House Comm. on Foreign Affairs*, 96th Cong., 2d Sess. 10 (1980) (testimony of William T. Lake, Deputy Legal Adviser, Dep't of State) ("The obligation of a party to the Protocol * * * is not to return an applicant who presents his claim for asylum inside the territory of the United States.").

[40] The court of appeals relied on a 1981 opinion of the Office of Legal Counsel in which OLC concluded that the proposed interdiction of Haitian flag vessels would not violate the Convention and observed

c. Later in 1989, the United States reaffirmed this position to the international community at a meeting of the Executive Committee of the U.N. High Commissioner for Refugees. At that meeting, the U.S. representative stated that Article 33 "pertained only to persons already in the country and not to those who arrived at the frontier or who were travelling with the intention of entering the country but had not yet arrived at their destination." *Summary Record of the 442nd Meeting* at 16, U.N. Doc. A/AC.96/SR.442 (1989). No party to the Convention expressed disagreement. Similarly, notwithstanding the controversy surrounding the United States' policy concerning Haitian migrants, no State questioned the United States' position at the most recent annual meeting of the Executive Committee in October of this year.

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that "[i]ndividuals who claim that they will be persecuted * * * must be given an opportunity to substantiate their claims." 5 Op. Off. Legal Counsel 242, 248 (1981) (J.A. 316-317); see Pet. App. 31a. The premise of this statement—that Article 33 applies to aliens outside the territory of the United States—was not accompanied by any analysis of the Convention's text and negotiating history or the formal pronouncements to the contrary by the State Department between 1972 and 1980. The failure of the OLC opinion to examine the premise that Article 33 applied on the high seas may perhaps have been due to the fact (which has just come to our attention) that the same premise was also assumed by some State Department personnel at the time—likewise without analysis and, apparently, without awareness of the negotiating history and the State Department's own prior pronouncements to the contrary. In any event, this unexamined premise within the government was short-lived. In 1985, the United States, in *HRC* v. *Gracey*, *supra*, formally restated its prior public position that Article 33 does *not* apply to aliens outside the United States, relying on the negotiating history of the Convention, subsequent international negotiations, and other materials that confirm that reading. Furthermore, in opinions dated December 11 and 12, 1991, respectively, the Department of State's Legal Adviser and the Assistant Attorney General for OLC examined the issue at length and concluded that Article 33 does not apply in this setting. Pet. App. 31a; J.A. 202-216, 217-223. The 1991 OLC opinion expressly reversed the conclusory statement in the 1981 OLC opinion relied upon by the court below. J.A. 222-223.

6. In sum, the President's interpretation of Article 33 as applying only to persons within the territory of the Contracting State finds compelling support in the text of Article 33, its negotiating history, its ratification by the United States in 1968, its implementation by Congress in 1980, and the official interpretation by the State Department. By the same token, there is no basis on this historical record for the court of appeals' unseemly attempts to dismiss as a mere "litigating posture" (Pet. App. 31a, 32a) the interpretation of Article 33 formally adopted by the President on behalf of the United States as party to the Protocol and as a member of the international community.

C. The 1980 Amendments To Section 1253(h) Do Not Give It Extraterritorial Reach

Despite the compelling support in the text of the INA and in Article 33 of the Convention for construing 8 U.S.C. 1253(h) in conformity with the presumption against extraterritoriality, the court of appeals held that the 1980 amendments to Section 1253(h) gave it a world-wide scope. The court noted that prior to 1980, Section 1253(h) provided that "[t]he Attorney General is authorized to withhold deportation of any alien within the United States" to a country in which the alien would be subject to persecution (see 8 U.S.C. 1253(h) (1976)), while the amended version provides that "[t]he Attorney General shall not deport or return any alien" to such a country. The court found it significant that the 1980 amendments bar "return" as well as deportation and omit the phrase "within the United States." See Pet. App. 15a, 19a, 20a. For at least three reasons, the court of appeals read far too much into those changes.

1. This Court has twice recognized that the 1980 revisions of Section 1253(h) were merely clarifying amendments designed to conform its language to that of Article 33. *Stevic*, 467 U.S. at 421; *Cardoza-Fonseca*, 480 U.S. at 436-437. The revisions on which the court of

appeals relied are consistent with that modest purpose, because Article 33 also contains the phrase "or return" (albeit with the parenthetical modifier "refouler"), but nothing parallel to "within the United States." There is no reason to believe that Congress intended those changes to have the further effect of rendering Section 1253(h) world-wide in scope, because Congress understood in 1980 that the Protocol (and therefore Article 33 of the Convention) applies to "refugees within the territory of the contracting states." H.R. Rep. No. 608, *supra*, at 17.

2. Prior to the 1980 amendments, this Court had held that the benefits of Section 1253(h) were confined to aliens in deportation proceedings, and were not available to "excludable" aliens who were apprehended at the border and paroled into the United States. *Leng May Ma*, 357 U.S. at 187; accord, *Stanisic*, 395 U.S. at 71. That holding rested on the Court's conclusion that such aliens were not among those "within the United States" in the "technical sense" in which that phrase was used in Section 1253(h). *Stanisic*, 395 U.S. at 71; see *Leng May Ma*, 357 U.S. at 190.[41]

Against this background, if Congress wanted to extend the benefits of Section 1253(h) to aliens in exclusion proceedings, the most logical way to accomplish that result was to delete the phrase ("within the United States") upon which this Court had relied in holding that such aliens were not covered by that Section. As Judge Walker pointed out, the legislative history of the 1980 amendments indicates that the revisions on which the court below relied were intended to do precisely that. See Pet. App. 58a (quoting H.R. Rep. No. 608, *supra*, at 30)

[41] Accord, *In re Pierre*, 14 I. & N. Dec. 467, 470 (1973), aff'd, 547 F.2d 1281 (5th Cir. 1977); *In re Cenatice*, 16 I. & N. Dec. 162, 164 (1977); see also *Plyler* v. *Doe*, 457 U.S. 202, 212-213 n.12 (1982) (noting *Leng May Ma*'s holding that an alien paroled into the United States was not "within the United States" for purposes of Section 1253(h), which reflected the "longstanding distinction" between exclusion and deportation proceedings).

(emphasis omitted) (changes "require * * * the Attorney General to withhold deportation of aliens who qualify as refugees and who are in exclusion as well as deportation proceedings"); accord, S. Rep. No. 256, 96th Cong., 1st Sess. 17 (1979).[42] And as Judge Walker also pointed out, Pet. App. 59a, the addition of "return" serves to clarify that intent, because "deport," as used in Part V of the INA, does not as a "technical" matter encompass the removal of excludable aliens, *Leng May Ma*, 357 U.S. at 187, while "return" does. Thus, at most, the amendments to 8 U.S.C. 1253(h) extended its coverage to aliens in exclusion proceedings. *Gracey*, 809 F.2d at 840-841 (Edwards, J., concurring and dissenting)[43]; Note, 80 Colum.

[42] The same understanding was expressed by witnesses for Amnesty International, U.S.A., during the 1979 hearings on a version of the bill that contained the changes (addition of "return" and deletion of "within the United States") on which the court of appeals relied. See *1979 House Hearings* 14-15 (section of bill amending 8 U.S.C. 1253(h)). Although the witnesses urged the committee to revise the provision further to make withholding mandatory, they stated that "Amnesty does welcome the most proposed change in section 243(h) which would remove the artificial distinction presently advanced by the Immigration and Naturalization Service between deportation and exclusion [illegible] at 169. During hearings in 1977 on a predecessor bill containing similar revisions, the Commissioner of INS likewise described their purpose to be "to make withholding of deportation [illegible] persecution available in exclusion, as well as expulsion [illegible]." See *Admission of Refugees into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 81 (1977); *id.* at 12 (relevant section of bill); see also 33, 84, 94.

[43] Judge Edwards noted that Section 1253(h) is broader than Article 33 of the Convention insofar as it applies to exclusion proceedings. 809 F.2d at 841. Judge Edwards pointed out (*ibid.*, note 136), in June 1980, INS issued regulations to implement the Refugee Act of 1980. Those regulations provided that after institution of exclusion or deportation proceedings against an alien, requests for asylum under 8 U.S.C. 1158 must be filed with the immigration judge, and such requests "shall also be considered as requests for withholding exclusion or deportation pursuant to section 243(h) of the Act [8 U.S.C. 1253(h)]."

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L. Rev. at 1131. By contrast, there is not the slightest suggestion in the legislative history of the 1980 amendments that Section 1253(h) was also to apply to aliens beyond our borders. Surely, some mention would have been made if Congress had intended such a dramatic departure.[44]

3. Finally, nothing in the text of Section 1253(h), even as amended, states that it applies outside the United States. At most, paragraph (1) is silent on the question. Under *Arabian American Oil* mere silence forecloses extra-territorial application, for only "specific language" to that effect will suffice. See 111 S. Ct. at 1231-1232.

What is more, the amended text of Section 1253(h), like the prior text, affirmatively demonstrates a domestic focus. As Judge Walker pointed out, "Congress' decision in the 1980 amendments to continue to address the provision to the 'Attorney General' * * * indicates that [Section 1253(h)(1)] as amended was to be applied to * * *

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45 Fed. Reg. 37,394 (1980) (adding 8 C.F.R. 208.3(b) (1981)). Current regulations likewise provide for withholding relief in exclusion as well as deportation proceedings. See 8 C.F.R. 236.3; see also *In re Rodriguez-Palma*, 17 I. & N. Dec. 465, 467 n.2 (1980) (because amended Section 1253(h) does not contain the phrase "within the United States," relief "is now available in both exclusion and deportation proceedings").

[44] The Conference Report, for example, refers to the amendments merely as providing for "withholding deportation," without even mentioning the word "return." See H.R. Conf. Rep. No. 781, *supra*, at 20. Similarly, although the section-by-section analysis of the bill in the House Report notes the extension of the provision to exclusion as well as deportation proceedings, the more general discussion of the bill refers only to "deportation." Compare H.R. Rep. No. 608, *supra*, at 20, with *id.* at 30. These shorthand descriptions reinforce the conclusion that Section 1253(h) was intended to apply only to aliens who are physically present in the United States. That was the interpretation given to Section 1253(h) in a 1980 report prepared by the Congressional Research Service at the request of Chairman Kennedy of the Senate Judiciary Committee soon after the 1980 amendments. See *Review of U.S. Refugee Resettlement Programs and Policies* 15 (Comm. Print 1980) (Section 1253(h) "is applicable only to aliens who are in the United States").

aliens over which the Attorney General had operational jurisdiction, and not to other refugees or potential refugees outside United States territory who might be encountered by other United States government personnel, be they Coast Guard, military, or the like." Pet. App. 59a-60a. Furthermore, although the 1980 amendments deleted the phrase "within the United States" from what is now paragraph (1) of Section 1253(h), they *added* no less than *four* references to the "United States" in the new paragraph (2) of Section 1253(h), which contains the various exceptions to the withholding requirement in paragraph (1). Exception (C) in paragraph (2) demonstrates that Section 1253(h) presupposes the alien's "arrival * * * in the United States," and exceptions (B) and (D) manifest a concern for the "community of the United States" and "security of the United States," respectively.

In short, the inference the court of appeals drew from the deletion of "within the United States" from paragraph (1) is more than offset by the addition of paragraph (2), and by the background and text of the amendments as a whole. The court of appeals' interpretation is also entirely implausible, for it ascribes to Congress the intent (without saying so) to use a two-word phrase buried in the body of Section 1253(h)—"or return"—to confer a free-standing right of non-repatriation on aliens throughout the world.

IV. EQUITABLE PRINCIPLES PRECLUDE THIS SUIT AND THE RELIEF RESPONDENTS SEEK

We have explained in Point I, *supra*, that respondents' judicial assault on the conduct of the interdiction program is precluded by the INA, which furnishes a right of judicial review only to aliens within the United States. But even if review is not statutorily foreclosed, the APA does not excuse courts from their duty "to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702(1). That provision was enacted in 1976, in response to recommendations by the Administrative Conference (H.R. Rep. No. 1656, 94th Cong., 2d Sess. 4

(1976); S. Rep. No. 996, 94th Cong., 2d Sess. 3 (1976)), to ensure that the APA's waiver of sovereign immunity does not allow courts to "decide issues about foreign affairs, military policy, and other subjects inappropriate for judicial action." See *Sovereign Immunity: Hearing Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 135 (1970) (report of Administrative Conference Committee on Judicial Review). The court of appeals' refusal to dismiss this suit in equity, and its decision instead to order injunctive relief, transgress this fundamental limitation.[45]

Since the President issued the new Executive Order on May 24, 1992, the Haitian migrant crisis has largely dissipated. The injunctive relief ordered by the court of appeals, if allowed to stand, will recharge that crisis, with all of its attendant problems: loss of life; interference with the conduct of foreign policy, the operation of military vessels on the high seas, and the use of a U.S. military base on hostile foreign soil in Cuba; and diversion of the limited resources of the State Department, Navy, Coast Guard, and INS from the tasks to which they have been assigned by the President and Congress. It will also impede the flexibility the President requires to address the migrant problem within the broader context of the sensitive and fluid situation affecting Haiti generally, which is the subject of ongoing diplomatic and economic measures. And it will undermine the ability of this Nation to speak with one voice, through the President, regarding the scope of the United States' obligations under Article

[45] The question is not simply whether an injunction should have issued once the court of appeals construed 8 U.S.C. 1253(h) (and Article 33 of the U.N. Convention) to apply in this setting. The courts below should have held as a threshold matter that this is not an appropriate case for injunctive or other equitable relief and dismissed this suit, without even reaching the issue of the application of 8 U.S.C. 1253(h) and Article 33. See *American Foreign Service Ass'n* v. *Garfinkel*, 490 U.S. 153, 161 (1989); see also *Webster* v. *Doe*, 486 U.S. at 604-605.

33 of the Convention, which the court of appeals, in the course of its opinion, has unilaterally extended to the high seas and throughout the world. Especially in the absence of an Act of Congress that purports to extend the equitable powers of federal courts into this sensitive area with far greater specificity than do the general judicial review provisions of the APA, "[t]he separation of powers problems present here make this virtually a textbook case for refusing such discretionary relief." *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1561 (D.C. Cir. 1984) (en banc) (Scalia, J., dissenting), vacated on other grounds, 471 U.S. 1113 (1985); see also *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985).[46]

[46] Injunctive relief restraining the operation of U.S. military vessels on the high seas is all the more inappropriate because it was sought by and granted to aliens who not only are outside the United States, but are nationals and residents of the foreign nation that is the very subject of the President's actions. The President, to whom the Constitution and Acts of Congress assign primary responsibility in this area, has assessed the overall situation and determined that the interests of the Haitian nationals concerned and other interests at stake are properly served by the policy he instituted on May 24, 1992: direct repatriation to Haiti, albeit with (i) an exception for interdictees who are threatened with immediate and grave physical danger (see note 5, *supra*), and (ii) provisions for the orderly processing of requests by Haitian nationals for admission to the United States as refugees under 8 U.S.C. 1157, which Congress enacted in 1980 specifically to govern the admission of refugees from outside the United States. It is not the role of a U.S. court to second-guess the adequacy of this admissions mechanism fashioned by Congress and the President, or to "balance" the interests of aliens abroad in circumventing that mechanism against other interests the court might deem relevant.

More than 15,000 Haitian nationals have availed themselves of the opportunity to file an application under 8 U.S.C. 1157 at the U.S. Embassy in Haiti. Although many residents of Haiti might choose to set out for the United States without prior approval under that Section, nothing in the INA grants them a right to do so. And nothing in the record supports the notion that there is a threat of persecution to members of the respondent class of such pervasiveness and magnitude that it would render relief under Section 1157 meaningless or justify the sweeping injunctive relief ordered by the court of appeals (see also

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded to the district court with directions to dismiss the relevant portions of the complaint.

Respectfully submitted.

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Reply Br. Pet. Stage 6-7 n.4)—even if we assume, arguendo, that the courts below could properly weigh the competing equities in this setting.

(17)

Supreme Court, U.S.
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No. 92-344

In the Supreme Court of the United States

OCTOBER TERM, 1992

GENE McNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the laws of the United States, including § 243(h) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1253(h), bar executive officials from forcibly and summarily returning Haitian aliens to Haiti, where their life or freedom would be threatened on account of political opinion.

2. Whether the courts below properly held that the Eleventh Circuit's ruling barring "screened-out" Haitians from challenging INS screening procedures did not collaterally estop "screened-in" Haitians from challenging a new policy of forced return without screening.

3. Whether the Immigration and Nationality Act or the Administrative Procedure Act permit the district court to review and enjoin a lawless policy of forced, summary return of Haitian aliens to Haiti.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

GENE McNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS,

v.

HAITIAN CENTERS COUNCIL, INC., ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

STATEMENT

I. Background

In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. 6577, 606 U.N.T.S. 267 ("Protocol"), and accepted as domestic law the 1951 Refugee Convention ("Refugee Convention"). Article 33 of the Convention mandates, categorically and without geographic limitation, that "[n]o Contracting State shall expel or return ("refouler") a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion" (emphasis added) (Joint Appendix ("J.A.") at 400). In the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 107 (1980), 8 U.S.C. § 1253(h) (1988), Congress amended § 243(h) of the Immigration and Nationality Act ("INA") to conform to Article 33. By deleting the preexisting limiting language "within the United States," Congress specified that "[t]he Attorney General *shall not* deport or *return any alien*. . . to a country if the Attorney General determines that such

alien's life or freedom would be threatened . . . " 8 U.S.C. § 1253(h) (emphasis added) (J.A. at 365).

The following year, the United States began interdicting, screening, and returning Haitians found in international waters, pursuant to a bilateral executive agreement signed with the Haitian government. Agreement Effected by Exchange of Notes, September 23, 1981, U.S.-Haiti, T.I.A.S. No. 10,241 ("U.S.-Haiti Agreement") (J.A. at 380). That agreement authorized the United States to return "detained vessels and persons to a Haitian port," but expressly acknowledged that even on the high seas the United States was bound by "*international obligations mandated in the Protocol* Relating to the Status of Refugees" (emphasis added). *Id.*[1] Evaluating the legality of this proposed program, the Justice Department's own legal counsel concluded that, even on the high seas, Article 33 obliged the United States to ensure that interdicted Haitians "who claim that they will be persecuted . . . *must be given an opportunity to substaniate their claims.*" "Proposed Interdiction of Haitian Flag Vessels," 5 Op. Off. Legal Counsel 242, 248 (1981) ("OLC Opinion") (emphasis added) (J.A. at 316-17). Accordingly, Executive Order No. 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1981), *reprinted in* 8 U.S.C. § 1182 (1988), which issued shortly thereafter, directed that in regard to aliens interdicted in international waters, the

> Attorney General shall . . . take whatever steps are necessary to ensure the fair enforcement of our laws relating to immigration . . . and the *strict observance of our international obligations concerning those who genuinely flee persecution in their homeland.*

Section 3 (emphasis added). Petitioners' Appendix ("Pet. App.") at 265a.

Thus, Article 33 of the U.N. Convention and Protocol, § 243(h) of the Refugee Act, and the U.S.-Haiti Agreement all prohibited petitioners from returning Haitians interdicted on the high seas to conditions of persecution without first making

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1"[U]nder these arrangements," the accord declared, "the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status." (J.A. at 382).

individualized determinations regarding the credibility of their claims of persecution. Pursuant to these legal mandates, for more than ten years petitioners pursued an interdiction program of "preliminary screening before return." Pet. App. at 10a. Under this program, "'[a]ny interdictees who made a credible showing of political refugee status were tentatively 'screened-in' and brought to the United States, where they could file a formal application for political asylum . . . . Interdictees unable to make such a showing were "screened-out" and returned immediately to Haiti." Petitioners' Brief ("Pet. Br.") at 3.

II. *HRC v. Baker*

In November 1991, Haitians began fleeing following the September 30, 1991 military coup that overthrew the government of President Jean-Bertrand Aristide. Petitioners continued their policy of "screening out" and returning to Haiti interdicted Haitians who lacked credible fears of persecution, but began housing "screened-in" Haitians at the United States Naval Base at Guantanamo Bay, Cuba. In November 1991, Haitian Refugee Center (HRC) brought a suit in the Southern District of Florida challenging the adequacy of the initial screening procedures on behalf of itself and a class represented by fifteen named plaintiffs, all of whom had been "screened-out." *HRC v. Baker*, Second Amended Complaint at ¶¶ 9-24 (J.A. at 97-104).

At that time, only Haitians who had been "screened-out" in the initial interview process were at risk of being forcibly returned to Haiti. The *HRC* class included only "screened-out" Haitians, i.e., persons who had been harmed by alleged inadequacies in the initial screening procedures.[2] The district court issued several injunctions

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2The class certification papers represented that "[t]he 15 [screened-out named] plaintiffs represent claims that are in every respect typical of the claims of the class." Class Cert. Mem. at 9 (J.A. at 126). Explaining that they were "challenging INS policies concerning the screening of potential asylees," Class Cert. Mem. at 6 (J.A. at 130), the fifteen named plaintiffs moved to certify a class consisting of

> all Haitian aliens who are currently detained or who in the future will be detained on U.S. Coast Guard cutters or at Guantanamo Naval base who were interdicted on the seas pursuant to the United States Interdiction Program and who are being denied First

(continued...)

against petitioners' conduct, which the Eleventh Circuit reversed in two separate rulings. Pet. App. at 171a, 190a. In opposing *certiorari* in *HRC*, the Solicitor General specifically represented to this Court that

> Under current practice [followed for more than a decade], any ["screened-in"] aliens who satisfy the threshold standard *are to be brought to the United States* so that they can file an application for asylum under section 208 (a) of the [INA]....These 'screened in' individuals then have the opportunity for a *full adjudicatory determination* of whether they satisfy the statutory standard of being a 'refugee' and otherwise qualify for the discretionary relief of asylum.

(Emphasis added) (J.A. at 252).[3] Yet only five days after this Court denied *certiorari* in *HRC*, petitioners broke that promise, began reinterviewing and repatriating "screened-in" Haitians *on Guantanamo* without lawyers, and repatriated many of these "screened-in" Haitians to Haiti.

III. *HCC v. McNary I*

Respondents then brought this action in the Eastern District of New York on behalf, *inter alia*, of "[a]ll Haitian citizens who have

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2(...continued)

Amendment and procedural rights.

Class Cert. Motion at 2 (J.A. at 119). Their supporting memorandum made clear that

> [t]he individual plaintiffs . . . were intercepted by the United States Coast Guard pursuant to a 'program of interdiction' that permits interception and repatriation of undocumented aliens. . . . *They have all been 'screened out'* . . . . Effectively, as a result, each of these plaintiffs *would be forcibly returned to Haiti* . . . were it not for the Court's order.

Class Cert. Mem. at 2 (J.A. at 126-27). Only Haitians who had been "screened-out" in the initial interview process were at risk of being forcibly returned to Haiti. Petitioners did not oppose the motion or respond to the Memorandum. Accordingly, the district court certified the class without a hearing or opinion. Order of December 3, 1991, *HRC* (J.A. at 89).

3Solicitor General's Response to Petition for Certiorari in *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992), at 3.

been or will be "screened-in," Memorandum of Law in Support of Plaintiffs' Motion for Provisional Class Certification at 3 (J.A. at 281), challenging petitioners' new policy and seeking an order that no "screened-in" Haitian on Guantanamo could be reinterviewed or repatriated without counsel.

The district court (Johnson, J.) issued a temporary restraining order ("TRO") and a preliminary injunction against petitioners' practices. In so holding, the *HCC* court concluded as a matter of law that the class of Haitian plaintiffs in *HRC* were "screened-out," and conditionally certified the class of "screened-in" plaintiffs, "a new class which is not bound by the outcome in *Baker*." Pet. App. at 150a, 162a. The court further found that respondents' complaint "raises new claims which were not litigated in *Baker*," *id.* at 151a, and that it would be "particularly unfair to bind the Screened-In Plaintiffs by the outcome in *Baker* when their cause of action arises from Government conduct occurring after the conclusion of the *Baker* litigation." *Id.* at 150a. The Second Circuit affirmed with modifications. *HCC v. McNary*, 969 F.2d 1326, 1337 (2d Cir. 1992) ("*HCC I*"), Pet. App. at 117a.[4] In each ruling, both courts rejected the government's claim that respondents were somehow collaterally estopped by the Eleventh Circuit's ruling in *HRC*, holding that "the class defined in [*HRC*] was overly broad, [and] that the issues presented in the present suit were not actually litigated or determined" there. Pet. App. at 93a. *See also* Pet. App. at 133a-36a, 149a-52a (District Court ops.).

IV. *HCC v. McNary II*

On May 24, 1992, pursuant to a new order issued by President Bush from Kennebunkport, Maine, petitioners dispensed with their legal obligations not to return aliens to a country where such aliens' life or freedom would be threatened. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992) ("Kennebunkport Order"), Pet.

4The Government's petition for rehearing and suggestion of rehearing *en banc* were denied on July 24, 1992. The Solicitor General has petitioned for a writ of *certiorari* to review the Second Circuit's decision. *See* No. 92-528, *McNary v. Haitian Centers Council, Inc.* Pursuant to this Court's orders, respondents' time to respond to the Government's petition in *HCC I* has been extended to March 10, 1993.

App. at 260a-63a.[5] Instead, petitioners Coast Guard and Immigration and Naturalization Service ("INS") instituted a new interdiction program of "summary return without screening," Pet. App. at 10a, forcibly returning *bona fide* refugees, without any process or questioning whatever, to conditions of persecution and death in Haiti.[6]

On the day that this new interdiction program began, upwards of 30 percent of all Haitians interdicted were being "screened into" the United States by INS Asylum Officers as having credible fears of persecution in Haiti. *See* P.E. 88 at 34 (J.A. at 66). But with the stroke of a pen, petitioners declared their indifference to the fears of interdicted Haitians, even as political violence in Haiti spiraled to unprecedented levels.[7] Moreover, notwithstanding § 243(h), § 2(c)(3) of the Kennebunkport Order purported to give petitioner Attorney General "unreviewable discretion" to deny that any interdicted Haitians arriving after May 24 had bona fide fears of political persecution.[8]

Pursuant to this new interdiction program, petitioners have forcibly repatriated more than 2,000 Haitians without any procedures whatever and in total disregard of their fears of political

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5Although petitioners now claim that the Kennebunkport Order was triggered by foreign policy exigencies, section 3 of that Order clearly states: "This order is intended *only* to improve the internal management of the Executive Branch." Pet. App. at 262a (emphasis added).

6*See HCC II*, Pet. App. at 13a ("[T]he Kennebunkport Order . . . made no pretense at all of adhering to the Solicitor General's prior representation to the Supreme Court. On the contrary, it permitted a policy, subsequently implemented, of *no* screening whatsoever.") (emphasis in original). Petitioners claim that "Coast Guard instructions" permit commanding officers of Coast Guard vessels to grant temporary refuge to interdictees "in immediate and exceptionally grave physical danger, based on either the officer's observation or compelling statements by the individual." Pet. Br. at 7 n.5. But respondents know of no instance when this exception has been invoked, or of any evidence that Coast Guard commanders have the time, the expertise or the training necessary to conduct meaningful asylum interviews on shipboard.

7*See generally* Briefs *Amici Curiae* of Americas Watch and Amnesty International; Lawyers' Committee for Human Rights, *Haiti: A Human Rights Nightmare* (1992).

8*See* Kennebunkport Order, § 2(c)(3) ("[t]he Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent."). Pet. App. at 262a.

persecution.[9] On May 28, 1992, respondents moved for a TRO on behalf of members of the "screened-in" class, challenging petitioners' new policy as *ultra vires* and violative of § 243(h) of the INA, Article 33 of the Refugee Convention, the U.S.-Haiti Agreement, the Administrative Procedure Act ("APA"), and the Equal Protection guarantee of the Fifth Amendment Due Process Clause.[10] The district court denied relief, but condemned the change in U.S. policy in the harshest possible terms, holding that "[p]laintiffs undeniably make a substantial showing of irreparable harm." *Id.* at 166a.[11]

9Pet. Br. at 3 n.2 & Coast Guard Public Statistics. In lieu of asylum processing in either Miami or Guantanamo, petitioners offered to process refugee claims at the U.S. Embassy and Consulate in Port-au-Prince under § 207 of the INA, 8 U.S.C. § 1157, noting that more than 9,000 applicants have sought refugee status through this route. Petition for Certiorari ("Pet.") at 9 n.6, 30 n.17. As we note below, the availability of one form of refuge under the INA—§ 207 embassy processing—cannot justify petitioners' unilateral elimination for Haitians of two other forms of statutory relief: § 243(h) protection against involuntary return, 8 U.S.C. § 1253(h), and § 208 asylum relief, 8 U.S.C. § 1158. Moreover, of the nearly 9,000 refugee processing applicants, respondents are aware of only 114 that have been even conditionally approved.

10All of these claims had been counts in the original complaint. (J.A. at 34-35). In their TRO request, respondents noted that petitioners' new policy immediately endangered three subgroups of the "screened-in" class: (1) some 150 Haitians (including at least one named plaintiff) whom petitioners had repatriated to Haiti even though petitioners had previously "screened" them in; (2) Haitians with credible fears of persecution who would be interdicted and would have been "screened-in" but for the new policy; and (3) unscreened Haitians on Guantanamo who would be "screened-in" but were now at risk of summary repatriation subject to the Attorney General's purported "unreviewable discretion." *See* Pet. App. at 8a. Subsequently, petitioners screened all Haitians on Guantanamo, shifting some members of the third group into the screened-in category.

11 It is unconscionable that the United States should accede to the Protocol and later claim that it is not bound by it. This court is astonished that the United States would return Haitian refugees to the jaws of political persecution, terror, death and uncertainty when it has contracted not to do so. The Government's conduct is particularly hypocritical given its condemnation of other countries who have refused to abide by the principle of non-refoulement. As it stands

(continued...)

On expedited appeal, the Second Circuit reversed and remanded with instructions to enter the injunction. Writing for himself and Judge Newman over Judge Walker's dissent, Judge Pratt rejected the Government's claim that the case is not judicially reviewable. *Id.* at 38a. The majority further denied that respondents were collaterally estopped by the Eleventh Circuit's prior ruling regarding § 243(h) in *HRC v. Baker* because that case involved different parties and changed circumstances. *Id.* at 7a-14a.[12] On the merits, the majority concluded that "the executive's action of reaching out into international waters, intercepting Haitian refugees, and returning them without determining whether the return is to their persecutors" constitutes the "return" of "any alien" forbidden by the plain language of § 243(h). Pet. App. at 23a.[13] Moreover, the majority found that the extraterritorial scope of § 243(h) conforms to both the plain language and object and purpose of Article 33 of the Refugee Convention in applying to "all aliens, no matter where found." *Id.* at 35a. Finally, the majority held that neither statutory provisions empowering the President to regulate entry, nor the President's constitutional powers as commander-in-chief and the "sole organ" of the nation in its external affairs, authorize the executive to do what Congress expressly forbade him from doing when it exercised its plenary immigration power in enacting § 243(h). *Id.* at 35a-38a.

In accordance with the Second Circuit's decision, the district court entered a preliminary injunction prohibiting petitioners from returning to Haiti any interdicted Haitian whose life or freedom would be threatened on account of political opinion. Pet. App. at

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11(...continued)

> now, Article 33 is a cruel hoax and not worth the paper it is printed on. . . .

Pet. App. at 167a (footnote omitted).

12The majority held that three subgroups of the class of "screened-in" plaintiffs, plus plaintiffs who had been "screened-out" under the new interdiction program, had not been parties to the earlier action. Pet. App. at 8a.

13In a concurrence joined by Judge Pratt, Judge Newman agreed that the "absolute" "command of section 243(h)"—"the alien shall not be returned to face persecution"—"cannot be circumvented by seizing the alien as he approaches our border, whether by land or by sea, and returning him to his persecutors." Pet. App. at 42a.

169a-170a. This Court stayed the lower courts' rulings pending final disposition of the Solicitor General's *certiorari* petition on August 1, 1992 and granted *certiorari* on October 5, 1992.

SUMMARY OF ARGUMENT

I. This is not a case about entry. It is about the right of Haitian aliens *not to be returned* to their homeland, where they fear political persecution. Before 1980, § 243(h)(1) of the INA, 8 U.S.C. § 1253(h)(1), "authorized" the Attorney General "to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of . . . political opinion." (J.A. at 365). In 1980, Congress removed the geographical limitation "within the United States" and made its command mandatory, to conform with our binding treaty obligations under Article 33 of the Refugee Convention. Section 243(h) now directs that "[t]he Attorney General shall not deport or *return any alien* . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of . . . political opinion." 8 U.S.C. §1253(h)(1), Pet. App. at 259a (emphasis added). On May 24, 1992, despite Congress' unambiguous mandate, petitioners began summarily and forcibly returning all interdicted Haitian aliens to Haiti, including *bona fide* refugees whose life or freedom would undeniably be threatened on account of their political opinion.

No government has ever before taken to the high seas to intercept fleeing refugees and return them, forcibly and without process, to their persecutors. In a careful and well-reasoned decision, the Second Circuit held that petitioners' unprecedented policy violates the plain language of § 243(h). That decision is correct and should be affirmed. The Second Circuit's decision simply enforced the unambiguous language and intent of both § 243(h) and the self-executing treaty provision that it embodies, Article 33 of the Refugee Convention. The text, structure and purpose, legislative history, negotiating history, and executive branch interpretation underlying the statute and treaty all confirm that § 243(h) applies to "any" Haitians interdicted on the high seas.

Petitioners now ask this Court to upset the Court of Appeals' decision, claiming that it interferes with sensitive military and foreign policy decisions. But ours is a foreign policy conducted

under law. Nothing in our immigration laws gives executive officials *carte blanche*, in the name of foreign policy, to respond to refugee flight by returning fleeing refugees to their persecutors. The Second Circuit's order does not require petitioners to admit any Haitians to this country; nor does it bar Haitians from sailing to third countries, from being brought to Guantanamo naval base, or even from being interdicted, so long as *bona fide* refugees are not returned.

II. Six of the seven judges who have considered petitioners' collateral estoppel claim have rejected it in five separate opinions, all noting that this case involves parties and circumstances different from those presented in the Eleventh Circuit's decision in *HRC*. Those rulings deserve substantial deference. First, respondents were not parties to *HRC*. All members of the *HRC* class had been "screened-out" and were interdicted pursuant to the United States Interdiction Program that was in effect when *HRC* was decided. Second, this case presents a pure question of law, thus rendering preclusion inappropriate as a matter of equity. Third, the Second Circuit properly denied estoppel based upon petitioners' representation to this Court when they successfully opposed *certiorari* months ago in *HRC*. Fourth, circumstances have dramatically changed as a result of petitioners' own conduct.

III. Nor is there any merit to petitioners' belated claims that the INA or the APA somehow immunize their lawless conduct from judicial review or exempt it from injunctive relief. Nonresident aliens located outside the United States qualify as "persons aggrieved by agency action" who are entitled to obtain review in U.S. courts of the legality of U.S. governmental acts under the APA. Section 702 of the APA creates a strong presumption favoring judicial review of final agency actions, and this Court has regularly reaffirmed that the presumption applies to the INS. Petitioners cannot demonstrate either an express or implied congressional intent to preclude review.

Similarly, nothing in 5 U.S.C. § 702 of the APA requires the district court to dismiss this action or to deny equitable relief. The text and legislative history of that provision demonstrate congressional intent not to alter the courts' traditional equitable discretion or to modify preexisting standards governing judicial review. No court has ever accepted petitioners' claim that this

provision acts, of its own force, as a limitation on equitable relief in immigration cases.

ARGUMENT

I. SECTION 243(H) OF THE INA BARS PETITIONERS FROM RETURNING "ANY ALIEN" TO A COUNTRY WHERE HER LIFE OR FREEDOM WOULD BE THREATENED

The laws of the United States, including § 243(h) of the INA, bar executive officials from summarily returning Haitian aliens to Haiti, where their life or freedom would be threatened on account of political opinion.[14] The decision below rests on the simple logic that Congress meant what it said when it rewrote § 243(h) in 1980.

Petitioners would overturn the Second Circuit's opinion based not on the explicit words of the statute and treaty, but on an elaborate patchwork of inapposite presumptions, negative inferences, text from other statutory provisions, snippets of legislative and negotiating histories, and their own reinterpreted litigating positions. Pet. Br. at 27-55. The Second Circuit fully considered and correctly rejected each of petitioners' contentions.

14By holding that § 243(h) applied extraterritorially to bar petitioners' policy, the Second Circuit did not reach or decide the questions whether the Kennebunkport Order should also be invalidated under Article 33.1 of the Refugee Convention, the U.S.-Haiti Agreement, or on equal protection grounds. Pet. App. at 39a. This Court has repeatedly held that respondents are "entitled under our precedents to urge any grounds which would lend support to the judgment below," *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977); *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982). Because these alternative grounds for affirmance are addressed thoroughly in the Briefs *Amici Curiae* of the Lawyers Committee for Human Rights (Article 33); the Association of the Bar of the City of New York (U.S.-Haiti Agreement); and the NAACP (equal protection), we do not address them here and incorporate those arguments by reference. Should the Court choose to reverse the Second Circuit's ruling regarding § 243(h), however, it should remand to the Second Circuit with instructions to consider these alternative grounds.

A. The Text of Section 243(h) and Article 33

1. Section 243(h)

Before 1980, § 243(h) provided:

> The Attorney General is authorized to *withhold deportation* of any alien . . . . *within the United States* to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

(Emphasis added).

The Refugee Act of 1980 explicitly amended this provision in three critical respects. Congress (1) deleted the words "*within the United States*"; (2) barred the government from "*return[ing],*" as well as "deport[ing]," alien refugees; and (3) made the prohibition against return *mandatory*, thereby eliminating the discretion of the Attorney General over such decisions.[15]

Petitioners would have this Court read "return" to mean only "expel from the United States" and "any alien" to mean only "any alien within the United States." By their reading, petitioners would restore by executive fiat precisely the language that Congress removed when it excised the words "within the United States."[16] Yet "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citations omitted).

15Section 243(h), now entitled "Withholding of Deportation *Or Return*," reads:

> The Attorney General *shall not* deport *or return any alien* [except those involved in Nazi war crimes] to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1253(h) (emphasis added).

16As Judge Pratt noted, "[t]o accept the government's reading of the statute, we would in effect be reading . . . words . . . back into § 243(h)(1). . . which would counter Congress's plainly expressed intent" to change those words in 1980. Pet. App. at 18a.

As the Second Circuit noted, the term "any alien" plainly encompasses Haitians interdicted on the high seas, who qualify as "*any* person[s] not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (emphasis added). Nor is there doubt that "the government's interception and forcible repatriation of Haitian refugees constitutes a 'return' of those refugees to their persecutors in violation of § 243(h)(1)." Pet. App. at 21a. "Return" means return: "to bring, send, or put (a person or thing) back to or in a former position." *Webster's Third New International Dictionary* 1941 (1986), *cited in* Pet. App. at 22a. Congress specified that the Attorney General may not return—i.e., send back—an alien "*to* a country" where she would face persecution, without specifying where an alien may not be returned *from*—*i.e.*, within or without the United States.

This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut National Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992), quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981) (citations omitted). The statute's plain language entirely proves our case.[17]

2. Article 33

Petitioners concede that the 1980 Refugee Act revised § 243(h) "to conform its language to Article 33" of the Refugee

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17Despite petitioners' claim, the *non-refoulement* obligations placed on Congress by Article 33, and by Congress on the Attorney General by § 243(h), bind the Coast Guard wherever it encounters potential refugees. All executive officers regulate immigration by virtue of delegations from Congress, particularly the Attorney General. *See Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). Petitioners claim 14 U.S.C. § 89 as a source of authority for the Coast Guard's actions, Pet. Br. at 2, but never mention that section's requirement that "officers of the Coast Guard . . . insofar as they are engaged in enforcing any law of the United States" shall "be deemed to be acting as agents of the particular executive department charged with administering that law and subject to that department's rules and regulations." 14 U.S.C. § 89(b) (1988).

Convention. Pet. Br. at 36.[18] Nonetheless, they ask the Court to ignore § 243(h)'s core purpose: to embed into United States law our humanitarian international obligation not to deliver fleeing refugees into the hands of their persecutors.

Article 33 of the Refugee Convention states categorically that "[n]o Contracting State shall expel or return ('*refouler*') a refugee in *any manner whatsoever to the frontiers* of territories where his life or freedom would be threatened" (emphasis added) on account of his political opinion.[19] None of the key terms in this article—"refouler," "refugee," "in any manner whatsoever" or "to the frontiers of territories where his life or freedom would be threatened"—is in any sense ambiguous.[20]

The ordinary meaning of the French word "*refouler*" is "return." Like "return," "*refouler*" connotes pushing or taking someone or something back to a place where he or it has previously been. The authoritative French dictionary, *Dictionnaire Larousse*, defines "*refouler*" as "to stem," "to repulse," or "[t]o drive back, repel." *Dictionnaire Larousse* 631 (1981) (Français,

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18"The imperative language of [§ 243(h)] is not an accident. . . . [T]he nondiscretionary duty imposed by § 243(h) parallels the United States' mandatory *non-refoulement* obligations under Article 33.1 of the United Nations Convention Relating to the Status of Refugees [citations omitted]." *INS v. Doherty*, 112 S. Ct. 719, 729 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

19Article 31 of the Vienna Convention on the Law of Treaties requires that treaties first be construed according to their "ordinary meaning." 1155 U.N.T.S. 331, T.S. No. 58 (1980), 8 I.L.M. 679 (1979), *entered into force* January 27, 1980. Petitioners accept the Vienna Convention as the prevailing authority in treaty interpretation. State Department Letter, Dec. 11, 1991 (J.A. at 412-13).

20Like § 243(h), Article 33 carries no territorial limit. Both clauses focus exclusively on the *object* of the prohibited government action ("any alien" in § 243(h); "a refugee" in Art. 33), the *nature* of the act ("The Attorney General shall not *deport or return*" in § 243(h); no state shall "*expel or return*" in Art. 33) and the act's *destination* ("to a country" of persecution, § 243(h); "to the frontiers of the territories" of persecution, Art. 33). Neither clause limits the location "from" which a refugee may not be returned. Thus, the explicit language indicates that the prohibition applies to "any alien," wherever situated.

Anglais).[21] Moreover, Article 33 uses the disjunctive word "or" to clarify the drafters' intent to contrast "return ('*refouler*')"—connoting "to push back" or "repulse"—with "expel," which Webster's defines as "to force out from," "eject" or "deport."[22] In French, the term "expel" is commonly translated not as "*refouler*," but as "*expulser*," *Larousse* (English French) at 241, which means ejecting someone from a place he has already entered, without suggesting where he should be ejected to. *See id.* at 314. For that reason, the French text of the Refugee Convention, which according to Article 46 is "equally authentic" as to its meaning, translates the operative phrase "no contracting State shall expel or return ('*refouler*')" as "Aucun des États Cóntractants *n'expulsera ou ne refoulera*." Pet. App. at 29a.

Petitioners seek to equate "expel" and "return," relying on a subsidiary meaning of "*refouler*" listed in a nonauthoritative French dictionary. Pet. Br. at 39 (citing *Cassell's French Dictionary*).[23] But "*refouler*" does not connote ejection of an alien from within the territory of a Contracting State. As the Second Circuit noted, "the government's strained reading of Article 33.1 would forbid a state to 'expel or expel' an alien," Pet. App. at 29a, an absurdly redundant reading that would deny independent meaning to each word of the phrase "expel or return ('*refouler*')." In refugee law, "*non-refoulement*" has become a well-recognized term of art that describes the absolute right of non-return that refugees acquire as

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21When the meaning of French terms in a treaty is an issue, the Supreme Court has "relied on . . . French dictionaries as a primary method for defining terms. . . ." *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489, 1494 (1991). *Dictionnaire Larousse* has been used as the authoritative French dictionary in this Court for more than a century. *See, e.g., Floyd*, 111 S. Ct. at 1494 (using *Larousse* to interpret the meaning of "lésion corporelle" in Article 17 of the Warsaw Convention); *Air France v. Saks*, 470 U.S. 392, 400 (1985) (using *Larousse* to define the term "accident" in Article 17 of the Warsaw Convention).

22*Webster's Third New International Dictionary* 799 (1986). "Expel" is also defined as "dislodge," "to drive away from a place or country: compel to leave: deport," "drive out: cast out. . . " *Id.*

23A computer-assisted search reveals that *Cassell's French Dictionary*, unlike *Dictionnaire Larousse*, has never been cited in a single Supreme Court case.

soon as they escape their homelands, regardless of whether they have also entered into another country.[24]

Equally unambiguous are the other words of Article 33. The Refugee Convention defines a "refugee" as one who "owing to a well-founded fear of" political persecution "is *outside* the country of his nationality," whether or not she is also inside another state. Art. 1(2). Similarly, the phrase "in any manner whatsoever" admits of no exceptions and clearly embraces stopping Haitian vessels on the high seas. Finally, the prepositional phrase "*to the frontiers* of territories where his life or freedom would be threatened" says nothing about the location *from* which the refugee is to be returned.

B. The Structure and Purpose of § 243(h) and Article 33

"In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990).

1. Section 243(h) as Part of the Refugee Act of 1980

The Refugee Act of 1980, "one of the most important pieces of humanitarian legislation ever enacted by a U.S. Congress,"[25] firmly committed the United States to a legal regime of comprehensive protection and treatment of refugees and asylum policy "to bring United States refugee law into conformance with the 1967 United Nations Protocol." *INS v. Cardoza-Fonseca*, 480

24Ordinary usage, as reflected in French newspapers, confirms that "*refouler*" describes petitioners' actions against respondent Haitian refugees. *See, e.g.*, Jean-Michel Caroit, *L'exode continue*, Le Monde, May 29, 1992, at 4 ("La décision du président Bush d'ordonner à la garde côtière américaine de *refouler* les boat-people haïtiens vers leur île pour tenter de mettre fin à un véritable exode a suscité." (President Bush's decision to order the U.S. Coast Guard to *return* the Haitian boat people to their island was an attempt to put an end to a genuine exodus.)) (emphasis added); *Le bourbier haïtien*, Le Monde, June 1, 1992 ("Les États-Unis ont décidé de *refouler* directement les réfugiés recueillis par la garde côtière ." (The United States has decided to directly *return* the refugees picked up by the Coast Guard)) (emphasis added).

25126 Cong. Rec. 4501 (1980) (remarks of Rep. Peter Rodino).

U.S. 421, 436-37 (1987).[26] The Refugee Act amended the INA to incorporate a three-part scheme of refugee protection:[27] (1) *§ 207*, 8 U.S.C. § 1157, an overseas refugee processing procedure made available outside the United States to those in their homelands or in third countries; (2) *§ 208*, 8 U.S.C. § 1158, a statutory right to apply for political asylum, made available to those aliens "physically present in the United States or at a land border or port of entry, irrespective of such alien's status,"; and (3) a modified *§ 243(h)*, 8 U.S.C. § 1253(h), the statutory *non-refoulement* provision, made available to "any alien" without geographic limitation, under strengthened language that codified our mandatory treaty obligation under Article 33 of the Refugee Convention.

These amendments provided overlapping, not alternative, protections to refugees. In § 243(h), Congress recognized that any alien who flees has a right of *non-return* to his persecutors as soon as he clears his country's territorial borders, without regard to whether he ever applies for entry and asylum in this country. Unlike §§ 207 and 208, however, which were designed as statutory vehicles whereby aliens could gain lawful admission into the United States, § 243(h) was designed solely to prevent aliens from being returned to their persecutors.[28]

Moreover, the 1980 statutory revisions enabled an alien to assert her refugee status in at least four different ways: (1) if physically present in the United States or at a port or land border, by an *affirmative asylum application* made to the INS under § 208;

26*See also INS v. Stevic*, 467 U.S. 407, 421 (1984) ("[s]ection 203(e) of the Refugee Act of 1980 amended the language of § 243(h), basically conforming it to the language of Article 33 of the United Nations Protocol"); *id.* at 418 ("there is no substantial difference *in coverage* of § 243(h) and Article 33") (citation omitted) (emphasis added); *INS v. Cardoza-Fonseca*, 480 U.S. at 429, 440; *INS v. Doherty*, 112 S. Ct. at 729 (Scalia, J., concurring in the judgment in part and dissenting in part).

27*See generally* Sponsors' Brief (recalling goals of framers of the Refugee Act).

28As the Sponsors' Brief makes clear, until now, no one ever suggested that any person or group could be denied the protections of § 243(h) simply because the option of § 207 processing allegedly remains available in their embattled homeland. Such an argument would mean that the Attorney General could do away with two statutory rights so long as he does not totally destroy the third.

(2) if he has entered the U.S., upon a request to an immigration judge for asylum and withholding of deportation under §§ 208 and 243(h) in a *deportation* proceeding conducted under Part V of the INA ("Deportation; Adjustment of Status"); (3) if he has not entered the U.S., upon a request made to an immigration judge for asylum and withholding of deportation under §§ 208 and 243(h) in an *exclusion* proceeding conducted under Part IV of the INA ("Provisions Relating to Entry and Exclusion") and (4) if he is outside the U.S., in a *§ 207 proceeding* conducted overseas without judicial review.

Petitioners claim first, that § 243(h)'s location in Part V of the INA ("Deportation; Adjustment of Status") somehow limits its applicability to aliens in deportation proceedings, concluding that the word "return" must mean "deport from within the United States." Pet. Br. at 35-36. But Congress originally placed § 243(h) in Part V of the INA at a time when it governed *only* withholding of deportation, and thus applied only to those aliens located within the United States who were subject to deportation. The Second Circuit found that after Congress expanded § 243(h) to bar forced return as well as deportation, this location was a historical relic of no significance. Pet. App. at 19a-21a. Indeed, if § 243(h)'s location in Part V were meaningful, its applicability would be limited solely to deportation proceedings and could not act, as it undeniably does, to protect aliens in exclusion proceedings under Part IV.

Second, as petitioners concede, when Congress amended § 243(h) in 1980, it added the § 208 asylum provision and specifically limited it to aliens "physically present in the United States." Pet. Br. at 30. Simultaneously Congress *deleted* almost identical words upon amending § 243(h). Congress's simultaneous enactment of territorially limiting language in § 208 and the deletion of similar language in § 243(h) presumptively demonstrates that the deletion was intentional and purposeful. *Cardoza-Fonseca*, 480 U.S. at 421 (citations omitted).

Section 208's territorial language also debunks petitioners' speculative claim that "if Congress wanted to extend the benefits of [§ 243(h)] to aliens in exclusion proceedings, the most logical way to accomplish that result was to delete the phrase. . . . 'within the United States' . . . ." Pet. Br. at 52. To the contrary, if Congress wanted to extend the benefits of § 243(h) only to aliens

in exclusion proceedings the most logical way was to add the words "physically present within the United States" to § 243(h), just as it did to § 208 and many other sections of the INA.[29]

Petitioner's argument also ignores that other provisions of the INA carefully employ the term "deport" to encompass both deportation *and* exclusion proceedings. *See, e.g.*, 8 U.S.C. §§ 1225(c), 1227(a)(1). Thus, the word "return" acquires meaning only if it applies, as the Second Circuit held and as the plain reading compels, to aliens *outside* the territorial limits of the United States.[30]

Petitioners claim that the addition of the "exceptions" clause, § 243(h)(2)(c), denying withholding of deportation or return to any alien who has committed a serious nonpolitical crime "prior to [her] arrival. . . in the United States," 8 U.S.C. § 1253(h)(2)(c), must mean that the non-return clause, § 243(h)(1), also applies only to aliens who have arrived in the United States. Pet. Br. at 34. But even if accompanying subsections do contain genuine limits, they cannot be read into other subsections that do not explicitly contain that limit. Congress's understandable decision to permit the deportation of criminal aliens who have entered U.S. territory hardly suggests its intent to permit the apprehension and return of noncriminal aliens who have not entered, and may have no desire

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29*See, e.g.*, 8 U.S.C. §§ 1158(a) (asylum coverage), 1159 (adjustment of refugee status), 1101(a)(27)(I) (defining "special immigrant" for visa purposes), 1254(a)(1)-(2) (eligibility for suspension of deportation), 1401(d),(e),(g) (requirements for nationality and citizenship at birth), 1408(4) (requirements for nationality but not citizenship at birth), 1409(c) (requirements for nationality status for children born out of wedlock), 1430(a)(1) (requirements for naturalization - married persons), 1503(b) (requirement for appeal of denial of nationality status) (1988); 8 U.S.C.A. §§ 1182(E) (exception under excludability of smugglers), 1251(a)(1)(E)(ii) (exception from general classes of deportable aliens), 1254a(c)(1)(A)(i), (c)(3)(B) (requirements for temporary protected status), 1255a(a)(3) (requirements for temporary resident status) (West Supp. 1992).

30Petitioners make much of the fact that § 207 processing applies to aliens outside the United States, but they point to no language in that section specifically extending it extraterritorially. Pet. Br. at 31. Given this concession, petitioners cannot explain why § 243(h), which similarly contains no such limitation and specifically dropped the words "within the United States," should be construed to require an alien's *presence in* the United States.

ever to enter, United States territory. Although Congress clearly knew how to limit the geographical reach of *part* of § 243(h) to aliens who had arrived in the United States, it consciously removed a parallel territorial limit in another part of the same provision. Given that "a change in language [must] be read, if possible, to have some effect," the removal must be understood as a conscious decision to extend § 243(h)(1)'s territorial applicability. Pet. App. at 18a-19a.

2. The Structure of Article 33 Within the Refugee Convention

Article 31 of the Vienna Convention on the Law of Treaties requires that treaties first be construed according not only to their "ordinary meaning" but also "in light of their object and purpose." The Refugee Convention was one of a wave of international human rights treaties originally drafted in response to the flight of millions of people during and after World War II. The Convention's purpose was to extend international protection to individuals who, having fled persecution in their own country, could no longer invoke that government's legal protection. One goal of the Refugee Convention was to accord economic and social benefits to refugees already lawfully admitted to a country, thereby affording such refugees the opportunities granted to other immigrants. For this reason, various chapters address the rights of refugees lawfully in a state's territory to juridical status (Ch. II), gainful employment (Ch. III), welfare (Ch. IV), and the like. None of these territorial references was intended, however, to bar the application of other provisions of the Refugee Convention to the high seas.

This is particularly true with respect to the negative prohibition of Article 33 of the Refugee Convention, one of the very few provisions that does not concern economic and social rights.[31] Article 33 expressly limits the freedom of a contracting state to expel or return *bona fide* refugees to their countries of persecution, wherever they may be found. The Convention's

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31Only three provisions speak strongly of negative prohibitions: art. 31.1, which bars imposition of penalties on refugees unlawfully in country of refuge if they come directly from a territory of persecution; art. 32.1, which bars expulsion of refugees lawfully in the territory except to preserve national security or public order, and the *non-refoulement* provision, art. 33.

drafters considered *non-refoulement* so important that originally no exceptions to the text of Article 33 were allowed.[32] To date, no nation has entered an exception or reservation to its Article 33 obligations. Numerous international publicists now conclude that the principle of *non-refoulement* has achieved the status of *jus cogens*, together with the prohibition against state-sponsored assassination and torture, and therefore is binding on nations regardless of any formal accession to it.[33] By removing time and geographic limitations under the 1951 Convention, the 1967 Protocol made clear the drafters' intent to universalize the principle of *non-refoulement*.

The origins and purpose of the Refugee Convention reveal that petitioners' core claim—that a contracting state's obligation under Article 33 of the Convention not to return refugees to their country of persecution somehow dissolves at its borders—turns the intent of the Convention's drafters on its head. See Affidavit of Louis Henkin ("Henkin Aff."), Appendix A.[34] A contracting state may no more commit *refoulement* on the high seas than it may commit torture or genocide there. As Judge Newman found, both § 243(h)

32Goodwin-Gill, *The Refugee in International Law* 72 (1983). Eventually, two narrow exceptions in subsection 33(2) were added, relieving states of Article 33(1)'s obligations for aliens who had been convicted of serious crimes or "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is." Art. 33(2). As with § 243(h), petitioners try unsuccessfully to read territorial language in an exception back into the general rule. Pet. Br. at 40-41.

33*See* Report of U.N. High Commissioner for Refugees, 40 U.N. GAOR Supp. (No. 12) at 6, U.N. Doc. A/40/12 (1985) ("*non-refoulement* has now come to be characterized as a peremptory norm of international law."); Cartegena Declaration on Refugees (Geneva, UNHCR 1984) conclusion 5 ("[*Non-refoulement*] is imperative in regard to refugees . . . as a rule of *jus cogens*.") "Jus Cogens," 12 *Hastings Intl. & Comp. L. Rev.* 436 (1989) ("right of *non-refoulement*, like all *jus cogens* norms, exists outside of treaties, and is non-derogable, binding, and judicially enforceable").

34While working at the State Department, Professor Henkin served as the United States' Representative to the First Session of the United Nations *Ad Hoc* Committee on Statelessness and Related Problems, in January to February, 1950. That committee drafted the Refugee Convention. As someone who was present at, and participated in, all of the meetings held during the Session, Professor Henkin speaks authoritatively about the intent of the drafters of the Convention, and the intent of the U.S. government. A sworn and signed original of his affidavit is filed with the Clerk of the Court.

and Article 33 "forbi[d] our country from laying hands on an alien anywhere in the world and forcibly returning him to a country in which he faces persecution." Pet. App. at 42a (Newman, J., with whom Pratt, J. joins, concurring).

"*Refouler*" is a term of art, but one that is not limited to a state's territory. In contrast to Article 32, which states that "Contracting States shall not *expel a refugee lawfully in their territory* save on grounds of national security or public order," Article 33 serves as the central protection accorded to a refugee *not* lawfully admitted to a contracting state, namely, the right not to be *expelled or returned to a territory* where her life or freedom would be threatened. *See* Henkin Aff. ¶ 8. By not limiting Article 33's applicability to refugees admitted to a contracting state, the drafters were intentionally choosing to apply Article 33's "*non-refoulement*" requirement to refugees who are outside the territorial borders of a contracting state. *Id.* ¶ 7. Thus, petitioners simply err when they claim that our interpretation of "return (refouler)" somehow renders the references to "expel" in Articles 32 and 33 superfluous. Pet. Br. at 39-40.

Moreover, petitioners prove nothing by pointing to express territorial limitations of other articles of the Convention. Pet. Br. at 41. Far from proving that Article 33 is similarly limited, they only show that the contracting states knew how to restrict a provision's territorial reach when they wanted, but imposed no such limit in Article 33. Likewise, petitioners' claim that Article 40 of the Convention—which permits a contracting state to declare at the time of signature to which of its territories the Convention shall extend—somehow restricts Article 33's geographical application to U.S. territory is also baseless. Pet. Br. at 41, 42 n.29. Article 40 is a "colonial clause," well-known in international law, which governs not the territorial application of the convention but who its signatories are.[35] The United States has never filed any declarations of territorial limitation under this provision.[36]

35*See* L. McNair, *The Law of Treaties* 118-19 (1961).

36*See* Defendant's Brief at 43 n.28, *HCC II* ("We have been informed by the Department of State that the United States has not filed any territorial declarations under Article 40. However, the Department regards the Convention as applicable (through the Protocol) to all territories for which the United

(continued...)

In sum, there is simply "no basis for th[e] view" expressed in Pet. Br. at 36 and § 2 of the Kennebunkport Order that the terms of Article 33 "do not extend to persons located outside the territory of the United States." Henkin Aff. ¶ 3. Petitioners ask this Court to forget that the Refugee Convention and the 1980 Refugee Act were drafted to aid, not shun, fleeing refugees. The Convention was triggered by the Second World War, primarily in response to the tragic experience of Jewish refugees during that period. If petitioners' reading is correct, and history repeated itself, the United States could escape its obligations under Article 33 simply by dispatching the Coast Guard to the high seas, apprehending fleeing Jews *before* they reached our waters, and deliberately returning them to their Nazi persecutors. This cannot be the law.[37]

C. Secondary Evidence

Unsupported by the text, structure, or purpose of the laws they cite, petitioners turn to secondary materials, selectively citing excerpts from the legislative history of § 243(h), the negotiating history of Article 33, and self-serving executive branch interpretations. Pet. Br. at 36-51. The clarity of both the statutory language and the treaty language it incorporates entirely forecloses petitioners' resort to the legislative and negotiating histories of

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36(...continued)
States is responsible for the conduct of foreign relations, including the Panama Canal Zone, Puerto Rico, the Virgin Islands, Guam, and American Samoa.")

37*See* Henkin Aff. ¶¶ 5-6. The St. Louis, a vessel carrying Jews fleeing Nazi Germany was turned away from New York Harbor to Germany's gas chambers. *See* Gordon Thomas & Max Morgan Witts, *Voyage of the Damned* (1974). Indeed, if President Aristide himself were currently en route to the United States by boat, petitioners' reading of the law would permit them to interdict him and return him to the hands of the Haitian military regime without ever inquiring about his fears of political persecution or ever making the determination required by § 243(h).

those instruments.[38] Nonetheless, examination of these sources supports the Second Circuit's decision.[39]

1. Legislative History of § 243(h)

Congress revised § 243(h) in 1980 to conform its language to Article 33, and the two provisions therefore have "parallel" territorial scope. Pet. Br. at 36, 52.[40] Both apply when the Attorney General or his agents attempt to return aliens interdicted on the high seas. Petitioners repeatedly claim that our position would render § 243(h) "world-wide" in scope. Pet. Br. at 51, 52, 55. In fact, we assert only that when, as here, the Attorney General and his agents take to the high seas to intercept fleeing refugees, the obligations under § 243(h) and Article 33 not to return those refugees to their country of persecution travel with such officials.

Petitioners offer the wholly speculative hypothesis that Congress added the words "or return" to § 243(h) and deleted the reference to any alien "within the United States," to extend § 243(h)'s benefits narrowly to excludable aliens who are physically inside but legally still outside the United States, thereby mitigating this Court's holding in *Leng May Ma v. Barber*, 357 U.S. 185 (1958). Pet. Br. at 52-54.[41] *Leng May Ma* held that excludable

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38When a statute's language is unambiguous, the courts must presume that the legislature meant what it said. *Cf. Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992) (ruling only on plain language and refusing to examine the legislative history); *United States v. Stuart*, 489 U.S. 353, 371 (1989) (Scalia, J., concurring) (if "the Treaty's language resolves the issue presented, there is no necessity of looking further to discover 'the intent of the Treaty parties.'").

39*See* Briefs *Amici Curiae* Sponsors' Brief (reviewing legislative history of § 243(h)); UNHCR; Association of the Bar of the City of New York (reviewing customary law and state practice); Former Attorneys General (challenging petitioners' statutory and treaty interpretation); and Henkin Affidavit (reviewing negotiating history of Art. 33).

40All available legislative history of the Refugee Act settles that § 243(h) has the same scope and force as Article 33. *See* H.R. Rep. No. 781, 96th Cong., 2d Sess. 20 (1980); H.R. Rep. No. 608, 96th Cong., 1st Sess. 18 (1979); *U.S. Refugee Programs: Hearing Before the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 14 (1980).

41Petitioners twice cite stray language regarding territoriality in the 1979 House Report. H.R. Rep. No. 608, *supra*, at 17; Pet. Br. at 47, 52. They never (continued...)

aliens paroled into the U.S. may not claim § 243(h) relief. Pet. Br. at 52-53.[42] The problem with the hypothesis is that Congress nowhere mentions *Leng May Ma* in the entire legislative history of the Refugee Act. Nor do petitioners offer any explanation why it took Congress twenty-two years to repair the statute to "correct" *Leng May Ma*, or why Congress did not simply substitute other limiting language for "within the United States" rather than removing the geographic limit altogether.[43]

2. Negotiation and Ratification History of Article 33

Similarly, petitioners rely on a strained reading of the statements of two foreign delegates—statements that were never

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41(...continued)
mention that that language referred both to asylum (which was admittedly territorial) as well as to withholding of deportation and exclusion, and was not repeated in the Conference Report on the 1980 Refugee Act, which adopted the House provision "with the understanding that it is based directly upon the language of the Protocol and *it is intended that the provision be construed consistent with the Protocol.*" H.R. Rep. No. 781 at 20 (emphasis added).

42Petitioners seek to buttress this point by citing testimony from the 1977 and 1979 bills, particularly by Amnesty International. Pet. Br. at 53 n.42. These hearings have little bearing on the matter before us, for both the 1977 and 1979 bills would have amended § 243(h) to give the Attorney General more discretion than he has under the current provision. *See Admission of Refugees into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 12 (1977); *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 14-15 (1979). The provision finally enacted was mandatory, not discretionary. Even assuming *arguendo* that petitioners' treatment of interdicted Haitians comports with the rejected 1977 and 1979 bills, that does not establish compliance with the higher standards of the 1980 Act as actually passed. Moreover, the legislative history clearly establishes that the House bill was amended following testimony from Amnesty International which advocated that the bill be amended to conform fully with Article 33.

43*See Chisom v. Roemer*, 111 S. Ct. 2354, 2364 (1991) (if Congress intended to change statutory coverage upon amendment, it "would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history . . . "). Moreover, as the Sponsors' Brief points out, even if § 243(h) is limited to persons in the circumstances of *Leng May Ma*, the Haitian refugees here are within its scope. *See* Sponsor's Brief.

commented or voted upon by the United States and never presented to or considered by the Senate during the 1968 ratification of the U.N. Protocol—as somehow indicative of a U.S. intent to limit Article 33's application to its own territory.[44] Pet. Br. at 42-44. Once again, the Second Circuit correctly rejected this claim. Pet. App. at 23a-35a.

In treaty interpretation, reliance on the treaty's negotiating history (*travaux préparatoires*) is an alternative of last, not first, resort. Vienna Convention on the Law of Treaties, Art. 32, 1155 U.N.T.S. 331, 340, 8 I.L.M. 679, 692 (1969), *entered into force*, Jan. 27, 1980 (J.A. at 413).[45] A treaty's plain language therefore must control unless there is "extraordinarily strong contrary evidence." *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982).

Petitioners cite a snippet of a massive negotiating record without re-examining the object and purpose of the Convention. As explained above, the core concern of the drafters of the Convention was to create broad protections for Europe's new populations of refugees, including an absolute right of *non-refoulement* in Article 33. The drafters thus limited Article 33 to make clear that it did not compel states to *admit* refugees, even while it unequivocally protected refugees from *refoulement* or return to territories where they feared persecution.[46]

44Petitioners isolate comments by two foreign delegates made during the 1951 Conference of Plenipotentiaries to make the sweeping claim that "the word 'refouler' in paragraph 1 of Article 33 can only be understood to embody a deliberate decision by the Contracting States (including the United States) to incorporate the territorial limitation we urge into the text of the Convention." Pet. Br. at 43.

45Article 31 instructs courts to rely primarily on a treaty's language and purpose. The negotiating history of a treaty can be used in treaty construction only as a last resort, and even then only if a plain language analysis "leaves the meaning ambiguous or obscure" or leads to a "manifestly absurd or unreasonable result."

46*See* Refugee Convention, Preamble:

> The High Contracting Parties
>
> * * *
>
> *Considering* that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which

(continued...)

When this point arose before the drafting committee in February 1950, the United States delegate, Louis Henkin (then a State Department official) recognized that the Committee had rejected a chapter requiring the granting of *admission* to refugees, but stated

> It did not, however, follow that the convention would not apply to persons fleeing from persecution who asked to enter the territory of the contracting parties. Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, . . . the problem was more or less the same. *Whatever the case might be . . . he must not be turned back* to a country where his life or freedom would be threatened. *No consideration of public order should be allowed to overrule that guarantee*, for if the State concerned wished to get rid of the refugee at all costs, it could send him to another country or place him in an internment camp.

Summary Record of the Twentieth Meeting, Ad Hoc Committee on Statelessness and Related Problems, U.N. Doc. E/AC.32/SR.20, at 11-12 (Feb. 1, 1950) (emphasis added).

When the Conference of Plenipotentiaries met the following year to adopt Article 33, the Swiss and Dutch delegates reiterated their concern about preventing mass migrations *into* their countries. The Dutch delegate wanted agreement, on the record, "that the possibility of mass migrations *across frontiers*, or of attempted mass migrations was not covered by article 33." A/CONF.2/SR.35 at 21 (emphasis added). He was not expressing an intent to promote forced extraterritorial repatriations of mass migrations *before* they reached his country's frontiers. Rather, he was making it clear that if large numbers of refugees appeared at the borders of his country, the non-return mandate of Article 33 would not obligate the Netherlands to let all of the refugees in ("across frontiers").

46(...continued)

> the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.

This is not to suggest that "*refouler*" means "expel" or that Article 33 does not apply extraterritorially.[47] Significantly, what the Dutch delegate had placed on the record was not the Swiss representative's definition of the word "*refouler*" but "that the Conference was in agreement *with the interpretation that the possibility of mass migrations across frontiers* or of attempted mass migrations *was not covered by article 33*." This interpretation remains true today. This is not a case about entry or asylum, but non-return.[48] Respondents have never claimed that the Attorney General is obliged to *admit* a mass Haitian migration across our frontiers or borders, only that Article 33 and § 243(h) bar the Attorney General from *returning* all arriving ships to Haiti.

Even then, apart from the Swiss and Dutch speakers, only four others of the twenty-six states represented at the provision's drafting voiced actual support for the Swiss and Dutch position, not surprisingly, the European countries of Belgium, Federal Republic

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47To the contrary, immediately after the President placed the Dutch delegate's statement on the record,

> Mr. HOARE (United Kingdom) remarked that the Style Committee had considered that the word "return" was the nearest equivalent in English to the French term "*refoulement*." He assumed that the word "return" as used in the English text had no wider meaning.
>
> The PRESIDENT suggested that in accordance with the practice followed in previous Conventions, the French word "refoulement" ("refouler" in verbal uses) should be included in brackets and between inverted commas after the English word "return" wherever the latter occurred in the text. He further suggested that the French text of paragraph 1 should refer to refugees in the singular.
>
> *The two suggestions made by the President were adopted unanimously.*

A/CONF.2/SR.35 at 21-22 (emphasis in original).

48For that reason, petitioners prove nothing when they describe the negotiating histories of the non-binding Declaration on Territorial Asylum and a Draft Convention on Territorial Asylum. Pet. Br. at 47-48. Both instruments were considered after the Protocol was adopted. That contracting states continued to resist a mandatory obligation of asylum in no way proves that they assumed a territorial limit on the Refugee Convention's mandatory duty of non-return.

of Germany, Italy, and Sweden.[49] The President of the Conference then ruled that the Swiss and Dutch interpretation be placed on the record—a record that contains thousands of pages of written material—not that the entire Conference agreed with that statement Pet. App. at 34a.[50] Even assuming *arguendo* that the Dutch and Swiss views represented the views of the entire Conference of Plenipotentiaries, they are in no way inconsistent with the U.S. government's position at the time.

> The crucial point, as now-Professor Henkin attests, is that
>
> [N]o government sought to reserve the right to reach out beyond its borders, seize potential refugees, and return them into the hands of their oppressors. By expressing a caveat about mass migrations, the delegates were confirming that the right of *non-refoulement* attached to individual refugees and not to groups. *They were not limiting the territorial reach of Article 33.*

Henkin Aff. ¶ 7. The position of the drafters regarding the territorial reach of Article 33 remained precisely that of Mr. Henkin the previous year: even if a country has no obligation under Article 33 to accept mass migrations for admission or asylum, "[w]hatever the case might be . . . [the refugee] must not be turned back to a country where his life or freedom could be threatened." U.N. Doc. E/AC.32/SR.20 at 11-12.

Mr. Henkin's views, and not those of the Dutch and Swiss delegates, represented the official position of the United States government. The United States delegate at the Conference of Plenipotentiaries the following year, Mr. George Warren, "took no action to rescind [Mr. Henkin's] interpretation or to support any other interpretation," Henkin Aff. ¶ 9, and hence the Henkin statement "continued as the official position of the United States

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49At least three of these, the Netherlands, Belgium, and Switzerland, now include in their domestic laws prohibitions *against* rejection at the frontier. *See generally* examples cited in Brief *Amicus Curiae* of Association of the Bar of the City of New York, pt. II.

50By contrast, formal amendments to the Convention's provisions were either "agreed" to or "adopted unanimously," as was Mr. Hoare's proposal regarding placing the word "refouler" alongside the word "return." A/Conf.2/SR.35 at 22.

government with regard to the meaning of Article 33." *Id.* Nor is there evidence that the Dutch and Swiss delegates' views were ever communicated to the Senate as the official position of the drafters when it gave its advice and consent to ratification of the Protocol in 1968.[51]

In sum, petitioners have not produced any contrary evidence to challenge the conclusion that Article 33 bars their actions against Haitians interdicted on the high seas, much less the "extraordinarily strong contrary evidence" necessary to overcome the plain language of Article 33. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982).[52]

51*See Arizona v. California*, 292 U.S. 341, 360 (1934) (rule of treaty interpretation permitting reference to *travaux* "has no application to oral statements made by those engaged in negotiating the treaty which were not . . . communicated to the government of the negotiator or to its ratifying body"). The U.S. ratification history of the Protocol, recounted in Pet. Br. at 45-47, lends no support to petitioners' claim. Petitioners observe that the U.S. became a party to the Protocol in 1968, understanding that our existing immigration laws already provided the protections that Article 33 required, and that at that time, § 243(h) applied only to aliens "within the United States." But this hardly proves that Article 33's territorial scope automatically shrunk to match § 243(h)'s. To the contrary, the Attorney General was expected to exercise his statutory discretion in a fashion compatible with the "more generous" interpretation provided in the Protocol. *INS v. Stevic*, 467 U.S. 407, 429 n.22 (1983). Thus, between 1968 and 1980, the Attorney General never took to the high seas to repatriate fleeing refugees, because he used his statutory discretion to "hono[r] the dictates of the United Nations Convention." *Id.* The fact that the President's Letter of Transmittal to the Senate, Pet. Br. at 45, mentions that "most refugees in this country" already enjoy most of the Convention's benefits, which are largely economic and social, hardly proves that the negative prohibition in Article 33 is territorially limited. By contrast, the Secretary of State's letter, reproduced in Pet. Br. at 45, describes the Protocol as guaranteeing the Article 33 prohibition to "refugees" without making any mention of their location.

52The commentators cited in Pet. Br. at 44, n.32 all address the reluctance of states to enter into obligations to grant *admission* to, as opposed to *non-return* of, refugees. None of the commentators address, much less support, the legality of forced, summary, extraterritorial return. Petitioners claim support from leading commentators (including the former U.N. High Commissioner for Refugees), but never mention that the *current* U.N. High Commissioner, whose refugee handbook this Court has recognized "provides significant guidance in construing the Protocol," *INS v. Cardoza-Fonseca*, 480

(continued...)

3. Executive Branch Interpretation

Finally, petitioners claim that the Executive Branch has consistently interpreted Article 33 as they now propose. Pet. Br. at 49-50. In fact, prior to the issuance of the Kennebunkport Order in May, 1992, every legal instrument governing Haitian interdiction mandated that the U.S. government, in intercepting and returning Haitians on the high seas, strictly observe the principle of non-return. When the Haitian interdiction began in 1981, the Justice Department's own Office of Legal Counsel found that the U.N. Protocol required that the interdiction program observe the rights of refugees in international waters.[53]

The 1981 U.S. agreement with Haiti that authorized interdiction cited "the international obligation mandated in the Protocol" and promised that the U.S. did not intend to return "any Haitian migrants *whom the United States authorities determine to qualify for refugee status*" (emphasis added). ("U.S.-Haiti Agreement") (J.A. at 382). Executive Order 12,324 affirmed this obligation by requiring that the INS and Coast Guard take whatever steps necessary to guarantee "the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland," § 3, and to ensure that "*no person who is a refugee will be returned without his consent*", § 2(c)(3) (emphasis added). Pet. App. at 265a. The INS Guidelines issued pursuant to Executive Order 12,324 further mandated that INS personnel be constantly watchful "for any indication (including bare claims) that a person or persons on board the interdicted vessel may qualify as refugees *under the United Nations Convention and Protocol*." INS Role In and Guidelines For Interdiction at Sea, October 6, 1981 (emphasis added). All the above legal instruments applied *exclusively* to the interdiction of Haitians on the high seas.

52(...continued)
U.S. at 439 n.22, has filed a Brief *Amicus Curiae* in support of respondents' interpretation of Article 33.

53 5 Op. Off. Legal Counsel 242, 248 (1981) (J.A. at 316-17). ("Individuals who claim that they will be persecuted . . . *must be given an opportunity to substantiate their claims*" (emphasis added).

Petitioners continued to acknowledge that Article 33 governed the interdiction program in testimony before Congress.[54] However, as petitioners acknowledge, Pet. Br. at 50, n.40, the government changed its interpretation when sued over its interdiction policy toward Haitians in *HRC v. Gracey*, 600 F. Supp. 1396 (D.D.C. 1985), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987). Until then, petitioners concede, both OLC and "some State Department personnel" simply "assumed" the "premise that Article 33 applied on the high seas," Pet. Br. at 50, n.40, a logical assumption given the clarity of the treaty language involved. Around that time, petitioners unearthed the inconclusive statements of two foreign delegates in the *travaux*, the interpretive tool of last resort, in the course of defending *Gracey*. The State Department then persisted in its reinterpretation of the treaty, first to buttress the executive's repeated failures to win congressional approval for the Haitian interdiction program,[55] and later to thwart other pending litigation.[56] This history simply confirms the Court of Appeals' conclusion that the government's second interpretation "was 'the sort of *post hoc* litigation posture that is entitled to no deference.'"

54In 1981, Acting Commissioner of the INS Doris Meissner testified that in interviewing interdicted Haitians, "[t]he INS officer's responsibility on the ship is to *insure that we are in compliance with the U.N. protocol. . . .*" *Asylum Adjudication: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 21-22 (1981) (emphasis added). The same point was made in 1989, by James Buck, Deputy Commissioner of the INS. He testified that in administering the interdiction program, the INS had "strictly observ[ed] our international obligations concerning those who are genuinely fleeing persecution in their homeland." *Haitian Detention and Interdiction: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. 28 (1989).

55*See, e.g., Haitian Detention and Interdiction: Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess., 36-43 (1989) (Statement of Alan J. Kreczko, Deputy Legal Adviser, Department of State).

56*See* D.E. 148, Department of State Letter from Edwin D. Williamson to Timothy Flanigan re: *Haitian Refugee Center Inc. v. Baker*, Dec. 11, 1991 (J.A. at 202-16) (arguing against extraterritorial application in light of *HRC* litigation).

Pet. App. at 31a, citing *Lewis v. Grinker*, 965 F.2d 1206, 1220 (2d Cir. 1992).[57]

Although petitioners now urge uncritical judicial deference to their expedient reinterpretation, *post hoc* executive-branch treaty analysis, proffered more than twenty years after ratification by an administration facing litigation, is highly suspect. This Court has given little credence to a party's argument where it constitutes "no more than statements of a litigating position." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 693 (1976). Nor have courts ever blindly deferred to executive treaty interpretations when the executive's position contradicts original intent or earlier executive treaty interpretations.[58]

57Indeed, Senate testimony by petitioner Eagleburger two months after the Kennebunkport order called into question whether petitioners themselves fully understood the new legal rationale:

> SEN. DeCONCINI: Mr. Eagleburger, what's the rationale for the President's May 24th executive order dealing with the Haitians, to return them without any interview by the INS? I'm told the answer is that *they're not on U.S. territory* so, therefore, they're not entitled to an interview. Is that all there is to it?
> MR. EAGLEBURGER: *No* —
> SEN. DeCONCINI: Had they gotten to Guantanamo or had they gotten to Key Biscayne then they would be entitled to an interview?
> MR. EAGLEBURGER: *No, no.* Senator, this is more complicated than that. But the rationale for the President's decision and executive order in May was that we—*it is not the issue that you raise. . . .* [I]t was not the issue of where they were or whether they would be interviewed, *it was simply a question of stopping the outflow at that particular time.*

Hearing of the Senate Judiciary Committee on U.S. Refugee Programs for FY 1993, 102d Cong., 2d Sess. (July 23, 1992) (LEXIS) (emphasis added).

58*See W.S. Kirkpatrick, Inc. v. Environmental Tectonics Corp.*, 493 U.S. 400, 408-409 (1990) (rejecting position urged by State Department); *Chan v. Korean Airlines, Ltd.*, 490 U.S. 122 (1989) (rejecting Department's interpretation of Warsaw Convention); *Perkins v. Elg*, 307 U.S. 325 (1939) (refusing to defer to altered executive branch policy in construing bilateral naturalization treaty); *Johnson v. Browne*, 205 U.S. 309 (1907) (rejecting executive's interpretation of extradition treaty).

D. Canons of Statutory Construction

In the end, petitioners are left only with a canon of statutory construction—the "presumption against extraterritoriality"—to support their effort to narrow the plain language of § 243(h) and Article 33. But as the Second Circuit properly concluded, the duty to construe statutes harmoniously so as to save them from infirmity under international law, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), effectively forecloses the statutory interpretation petitioners urge.

1. The Presumption Against Extraterritoriality

Petitioners' misplaced reliance on the so-called presumption of against extraterritoriality cannot overcome the plain language of § 243(h). The presumption against extraterritoriality is just that, a presumption without evidentiary weight that operates only where there is an "unexpressed congressional intent." *Foley Bros. Inc. v. Filardo*, 336 U.S. 281, 285 (1949); Pet. App. at 16a. Congress' intent to apply § 243(h) extraterritorially was hardly "unexpressed," but unambiguously stated.

Furthermore, whatever force the presumption may have with regard to a primarily domestic statute, that force evaporates when a statute that regulates distinctively international subject matter, such as immigration, nationality, and refugees, is involved. The INA operates worldwide.[59] INS officers work throughout the world. By definition, refugees are persons who either are or have been outside the United States, and executive officials cannot decide whether they should receive asylum without assessing the conditions in their home countries. By their own terms, numerous

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59 8 C.F.R. § 100.4(c)(4). *See also* C. Gordon & S. Mailman, *Immigration Law and Procedure* § 3.11. A key goal of the Refugee Act of 1980 was "[t]o repeal the current immigration law's discriminating treatment of refugees by providing a new definition of "refugee" that recognizes the plight of the homeless *all over the world*." S. Rep. No. 256, 96th Cong., 2d Sess. 1 (1979).

sections of the INA apply outside the United States,[60] while others apply not by their terms, but by their purpose or operation.[61]

Thus, petitioners may not invoke a presumption where the executive action at issue has itself extended the statute extraterritorially. Petitioners cite §§ 212(f) and 215(a) of the INA as authority for their actions in reaching well beyond the territory of the United States to seize Haitians and force them back to the land they are fleeing. Pet. Br. at 2. But neither statutory provision specifically authorizes the President to act beyond United States borders. Nor did either authorizing section originally contain territorially limited language that the Refugee Act of 1980 excised. Thus, if petitioners were correct that the presumption against extraterritorial application operates against § 243(h), *a fortiori* it must also deny them the very authority under which they claim to be conducting the entire interdiction.[62]

As explained in *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991), the presumption acts as a tool of statutory construction which "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 111 S. Ct. at 1230, citing *McCulloch v. Sociedad National de Marineros de Honduras*, 372

60*See, e.g.*, §§ 101(a)(42)(B) (definition of "refugee" includes people outside U.S.); 221 (visa issuance abroad); 222 (visa application abroad); 283 (travel expenses outside U.S.); 301, 303, 308, 320-21, and 322 (nationality determined by birth outside the U.S.); 329 (naturalization through military service abroad); 330 (regarding service on U.S. military vessels on high seas).

61*See, e.g.*, §§ 207 (makes no provision for refugee applications abroad, yet 8 C.F.R. § 207.1(a) does so provide); 234 (no mention of health examinations by U.S. officials outside the United States, yet Public Health Service officials test Haitians at Guantanamo); 235 (by its terms, does not provide for inspection outside the U.S., yet 8 C.F.R. § 235.5 provides for preinspection stations abroad); 329(a) (not requiring extraterritorial awards of posthumous citizenship for certain aliens who served in the U.S. military, yet 8 C.F.R. § 329.2 does so provide).

62Similarly, only petitioners' attempts to circumvent the constraint of § 243(h), through interdiction on the high seas, results in the extraterritorial reach of the statute. Respondents know of no case in which the presumption, which petitioners manipulate in an attempt to avoid judicial review, has been applied to permit the executive to act extraterritorially, where a statute would preclude such conduct domestically.

U.S. 10, 20-22 (1963).[63] Similarly, Justice Stevens' concurring opinion in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2150 n.4 (1992), noted that the question was whether extraterritorial application should be given to a statute regulating the activities of private litigants within another sovereign state.[64] These comity-based concerns are plainly not implicated when the executive acts on the high seas in an area governed strictly by international law.[65]

More fundamentally, § 243(h) is not just an immigration statute, it is a statute that conforms domestic law to the terms of an international treaty that states a universal and mandatory human rights norm. As an immigration and refugee statute, the INA plainly does not focus on purely domestic affairs of the United States.[66] For the presumption to be at issue here, petitioners must maintain that application of § 243(h) to the high seas would impinge on the laws of another sovereign. The only other country

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63This Court should note that the United States, in *Aramco*, agreed with respondents' position that comity is the driving force behind the presumption, but here, hide that principle. *Compare* Brief of the EEOC at 25-26, *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991) (Nos. 89-1838 & 89-1845) ("Title VII is unlikely to generate serious conflicts with the laws of individual foreign states") and Reply Brief of the EEOC at 15-16, *id.* (noting that "international law does not foreclose the extraterritorial application of Title VII in the context of U.S. employers which discriminate against U.S. citizens") *with* United States Brief at 23-25, *Smith v. United States*, No. 91-1538 (U.S. docketed June 15, 1992) (asserting that the presumption against extraterritoriality is applied generally and forecloses application of U.S. law even where comity is of no concern) and Pet. Br. at 27 ("presumption bars application of federal statutes to the high seas as well as foreign countries").

64Indeed, in *Lujan*, the regulation at issue applied the Endangered Species Act both in U.S. territory and on the high seas; the only question was whether it should also apply in the territory of a foreign sovereign. 112 S. Ct. at 2135, citing 3 C.F.R. § 402.01.

65Congress need not "make specific provisions in the law that the *locus* shall include the high seas," where "to limit th[e] *locus* to strictly territorial jurisdiction would greatly curtail the scope and usefulness of the statute and leave open a large immunity for [illegal acts] committed . . . on the high seas." *United States v. Bowman*, 260 U.S. 93, 98 (1922).

66In another pending case, the United States admits that the "presumption against extraterritoriality 'is based on the assumption that Congress is primarily concerned with domestic conditions.'" Resp. Br. at 26, *Smith v. United States* (No. 91-1538), citing *Foley Bros.*, 336 U.S. at 285.

implicated is Haiti, and no nation can claim the sovereign right to have political refugees returned to it for persecution. The Refugee Act of 1980 specifically sought to conform the INA with Article 33 of the Protocol, precluding any presumption that Congress's enactment of this statute was set against the backdrop of domestic affairs.

Petitioners' claim that the presumption should rewrite the words "any alien" in § 243(h) to exclude "aliens who have been interdicted on the high seas" borders on the frivolous. Congress's definition of the term "alien" as "any person not a citizen or national of the United States," 8 U.S.C. § 1101(a)(3), immediately suggests that Congress's directive that the executive "shall not return or deport any alien" will have an international effect. 8 U.S.C. § 1253(h). Similarly, "any" means any, without regard to geographic limitation. This Court has allowed extraterritorial application of similar general language, without any specific reference to conduct occurring abroad, when comity concerns do not dictate otherwise.[67]

2. Section 243(h) Must Be Construed Consistently With the INA, the Constitution and International Law

If any canons of statutory construction apply here, they are the well-settled principles that statutes must be construed harmoniously and consistent with international law. The Kennebunkport Order does not compel petitioners' policy of forced summary return. By its terms, the President merely purports to grant petitioners unreviewable discretion, which they have exercised by summarily and forcibly returning *bona fide* refugees to conditions of persecution and death in Haiti, a clear-cut violation of § 243(h). By executing such a policy, petitioners have asserted discretion that both exceeds and violates their delegated authority under the INA,

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67*See, e.g., Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 705 (1962) (applying Sherman Act to activity occurring in Canada); *Société Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197, 211-212 (1958) (applying rules of discovery to parties in Switzerland); *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 310 (1970) (Jones Act provides remedy to alien seaman on foreign-flagged ship); *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952) (Lanham Act speaks of "any person").

a comprehensive statutory scheme enacted by Congress in the exercise of its plenary immigration power.[68]

Petitioners cannot reasonably claim to be acting pursuant to the President's constitutionally enumerated Commander-in-Chief power, an authority nowhere cited in the Kennebunkport Order. This case does not involve the President's power to direct military ships at sea, but rather, petitioners' blanket decision to return all fleeing Haitians to persecution.[69]

Similarly, this case raises no broad challenge to the President's unenumerated constitutional powers over foreign affairs. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).[70] In his classic concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson made clear that "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." 343 U.S. 579, 635 (1952)

68When Congress acts in the immigration field, it exercises plenary power, *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972), which is "not open to question," *INS v. Chadha*, 462 U.S. 919, 940 (1983). Article I, section 8, clause 4 authorizes Congress, not the Executive, to "establish an uniform Rule of Naturalization," thus granting Congress exclusive legislative power in immigration matters. "[O]ver no conceivable subject is the legislative power of Congress more complete...." *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909), *quoted with approval by, Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

69Such disregard cannot be justified by an invocation of foreign affairs concerns.

> Despite the attorney general's broad discretion to base other types of immigration decisions on factors such as the government's political and foreign policy interests, our examination of the asylum statute convinces us that *Congress intended to prevent such factors from influencing asylum cases.*

Doherty v. United States Dep't of Justice, 908 F.2d 1108, 1118 (2d Cir. 1990) (emphasis added), *rev'd on other grounds*, 112 S. Ct. 719 (1992). Petitioners are hard-pressed to argue that restraints on the Coast Guard infringe upon the Commander-in-Chief power when the President himself has placed that agency under the direct control of the Department of *Transportation*. Decl. of Admiral Leahy, D.E. 152.

70The President's authority to "speak or listen" on behalf of the United States does not include a power to ride roughshod over the rights of individuals or to exceed his authority, because even the President's power as the "sole organ" of our nation in its foreign relations "must be exercised in subordination to the applicable provisions of the Constitution." *Id.* at 319-20.

(Jackson, J., concurring). In immigration, the authority of the executive "is limited to the zone charted by Congress. If such [executive] officers depart from the channels of authority fixed by statute they act illegally."[71]

In passing § 243(h), Congress has acted, and decisively, to forbid defendants from forcibly returning any alien whose "life or freedom would be threatened." The congressional mandate that defendants not return refugees to their persecutors places this case squarely within "category III" of Justice Jackson's *Youngstown* concurrence. Pet. App. at 35a. The President is acting here in a manner "incompatible with the expressed or implied will of Congress," and therefore "his power is at its lowest ebb, for he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring).

The grants of authority contained in the Kennebunkport Order authorize the President only to limit "entry" of certain aliens, § 212(f), or to set procedural rules for an alien's departure from or entry to the United States. § 215(a)(1).[72] Neither can reasonably be read to empower defendants to forcibly and summarily *return* refugees to their persecutors, without any determination of their refugee status. Nor has the President ever before invoked these statutory sections for such a purpose.[73] Established rules of statutory construction require that §§ 212(f) and 215(a)(1) of the INA be read consistently with § 243(h) of the same statute. 2 Sutherland, *Statutory Construction* § 4704. Provisions of the same statute governing entry should not be read to provide the authority for gutting that mandatory duty.

71C. Gordon & S. Mailman, *Immigration Law and Practice* § 9.02, at 9-5, citing *Mahler v. Eby*, 264 U.S. 32 (1924).

72Petitioners also mention 14 U.S.C. § 89(a) as authority to seize and return Haitian vessels in Haitian waters. But defendants' own 1981 OLC Opinion makes clear that the Coast Guard cannot invoke this section to seize Haitian vessels "because the waters of Haiti are not within the jurisdiction of the United States." 5 Op. Off. Legal Counsel at 249 n. 17.

73All previous presidential Proclamations and Executive Orders citing either of these statutory provisions have concerned either restrictions on aliens *entering* the United States or restrictions on U.S. citizens traveling to foreign nations.

Similarly, canons of statutory construction require that these provisions of the INA comport with, not violate, the international obligations of the United States,[74] embodied in Article 33 of the Protocol and the U.S.-Haiti Agreement. Petitioners' policy of forcing *all* Haitians back to Haiti, including those whom they know to have credible fears of persecution, flatly violates the terms of Article 33 and the U.S.-Haiti bilateral agreement, which implements *with specific regard to Haitian refugees* the universal obligation of *non-refoulement*.

Without Haitian consent under the explicit terms of the executive agreement, defendants have no authority to stop and board Haitian ships on the high seas.[75] Petitioners cannot abrogate the agreement without giving the Haitian government six months' notice, as the agreement explicitly requires. If petitioners have *de facto* abrogated the agreement, their continued interdiction of Haitian ships is unauthorized and *ultra vires*.

II. THE COURTS BELOW DID NOT ABUSE THEIR DISCRETION BY HOLDING THAT THE ELEVENTH CIRCUIT'S RULING BARRING "SCREENED-OUT" HAITIANS FROM CHALLENGING INS SCREENING PROCEDURES DID NOT COLLATERALLY ESTOP "SCREENED-IN" HAITIANS FROM CHALLENGING A NEW POLICY OF FORCED RETURN WITHOUT SCREENING

Throughout this litigation, petitioners have sought to escape judicial scrutiny by hiding behind the doctrine of collateral estoppel. Six of the seven judges who have considered petitioners'

74"[A]n act of Congress ought never be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.); *United States v. Palestine Liberation Organization*, 695 F. Supp. 1456, 1464-65 (S.D.N.Y. 1988).

75Except when a ship is "engaged in piracy, slave trade, or unauthorized broadcasting," a state may board the vessel of another state *only with the express consent and authorization* of that state. Restatement (Third) of Foreign Relations Law of the United States § 522 & Reporters' Note 8; 1958 Convention on the High Seas, art. 22; 1982 Convention on the Law of the Sea, art. 110; 1 L. Oppenheim, *International Law* § 264 (8th ed. 1955); 5 Op. Off. Legal Counsel 242, 243 & n.4.

collateral estoppel claim have rejected it, all noting that this case involves parties and circumstances different from those presented in *HRC v. Baker*.[76] The lower courts have correctly ruled that respondents are not collaterally estopped by the Eleventh Circuit's decision in *HRC* because: (1) respondents were not parties to *HRC*; and (2) circumstances have changed dramatically as a result of petitioners' own conduct, rendering preclusion inappropriate as a matter of equity. Petitioners now ask this Court to sit as a court of error and to review *de novo* the determinations made below. Petitioners assert that the lower courts lacked discretion to deny estoppel, demanding that all Haitians be forever precluded from litigating the question whether § 243(h) applies outside the United States. Pet. Br. at 20-21, 24-25.

HRC involved both different parties and changed circumstances from those now before this Court. The courts below correctly determined that the Eleventh Circuit's judgment does not estop respondents, who were neither parties nor privies to the *HRC* litigation. Moreover, the court of appeals acted well within its discretion by declining to apply collateral estoppel because the policy now under review was unforeseeable at the time of *HRC* and the issue here is a pure issue of law which the Eleventh Circuit decided incorrectly. Finally, both the majority and concurring opinions below correctly recognized that to let

> the Government keep the Eleventh Circuit ruling from the Supreme Court on a promise that is no longer being honored and then let the Government keep our decision from the Supreme Court by asserting that we had correctly applied collateral estoppel . . . would be gamesmanship of the rankest sort, especially inappropriate in a lawsuit affecting people's lives.

Pet. App. at 40a (Newman, J., concurring). *See also id.* at 14a.

76*See* Pet. App. at 133a-136a (Johnson, J.) (TRO); *id.* at 149a-152a (Johnson, J.)(Preliminary Injunction); *id.* at 86a-96a (*HCC I*) (Pierce & Cardamone, JJ.); *id.* at 7a-14a (Pratt & Newman, JJ.); *id.* at 40a-41a (Newman, JJ.). Without questioning the majority's rejection of petitioners' collateral estoppel claim in *HCC I*, Judge Mahoney implicitly accepted it en route to dissenting on the merits. *See id.* at 118a-124a (Mahoney, J.).

A. Respondents Cannot Be Bound by a Judgment Against the Class in *HRC v. Baker*, to Which They Did Not Belong

One cannot be bound by a prior judgment unless one was a party to, or represented by a privy in, the prior action. *See Parklane Hosiery Co. v. Shore Inc.*, 439 U.S. 322, 327 & n.7 (1979).[77] Although it is true that "a judgment in a *properly entertained* class action is binding *on class members* in any subsequent litigation," *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 874 (1984) (emphasis added), the judgment against the *HRC* plaintiffs cannot bind respondents, both because respondents were not class members in *HRC* and because the *HRC* class action was not properly maintained.[78] As the Second Circuit has twice recognized, the "screened-out" plaintiff class in *HRC* was defined in "an 'overly broad' fashion which did not fairly and adequately represent the interests of the [screened-in] plaintiffs herein." Pet. App. at 7a. The *HRC* class action was brought by fifteen named plaintiffs who were "screened-out" after being intercepted on the high seas, pursuant to the interdiction program followed by petitioners for more than ten years prior to the Kennebunkport Order. Under that program, interdicted Haitians were either "screened-in" (*i.e.*, found to have a credible fear of persecution) or "screened-out" (*i.e.*, found not to have made such a showing). The "screened-out" *HRC* plaintiffs challenged the adequacy of the then-existing screening procedures, not the denial of any screening

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77*Accord Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984); *Hansberry v. Lee*, 311 U.S. 32, 45 (1940); Restatement (Second) of Judgments § 42(1)(b). As this Court repeatedly has held:

> [s]ome litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

Blonder-Tongue Labs., Inc. v. University of Illinois Found., 402 U.S. 313, 329 (1971); *accord Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-481 (1982).

78*See* Pet. App. at 133a-136a (TRO); *id.* at 149a-152a (Preliminary Injunction); *id.* at 86a-96a (*HCC I*); *id.* at 7a-14a (*HCC II*).

whatsoever. Thus, as Judge Pratt noted, membership in the *HRC* class entailed: current or future detention on cutters or at Guantanamo Bay; interdiction pursuant to the *then-existing* United States Interdiction Program; and denial of first amendment and procedural rights. Pet. App. at 9a-10a.

The class conditionally certified in this case is entirely different. It consists of " '[a]ll Haitians who have been or will be "screened-in," ' " Pet. App. at 10a.[79] These "screened-in" plaintiffs have never challenged the adequacy of the screening procedures, because they benefitted by them. The "screened-in" plaintiffs in this action cannot be bound by a challenge brought by "screened-out" Haitians to the adequacy of a screening procedure which no longer exists, and with which "screened-in" Haitians did not take issue. Indeed, as the Second Circuit recognized in *HCC I*, the screened-in refugees could not properly have been part of the earlier Florida action, both because none of the named plaintiffs there were screened-in and because the interests of the two groups with regard to the legality of screening were antagonistic. Pet. App. at 93a-96a.

Even if the *HRC* class could be read to include respondents, the courts below held that the class was improperly certified under Fed. R. Civ. P. 23, because respondents' interests were not adequately represented by the "screened-out" named plaintiffs in *HRC*. The courts below properly reviewed the propriety of the class certification in *HRC* and found it overbroad. Pet. App. at 93a.[80]

79Some 150 class members—including at least one named plaintiff—have been repatriated to Haiti even though petitioners previously screened them in. More than 2,000 others have been interdicted after May 24, 1992, and summarily returned to Haiti. Given that roughly 1/3 of all interdicted were being "screened in" when the Kennebunkport Order issued, perhaps 700 or more of these Haitians would have been "screened in" under the old interdiction program. Still others have not left Haiti, but would have fled and been "screened in" in the future, had the Kennebunkport Order not been promulgated.

80An original court's class definition may guide, but cannot bind, a later court. For "the court conducting the action cannot predetermine the res judicata effect of the judgment; this can be tested only in a subsequent action." Fed. R. Civ. P. 23(c)(3) (Advisory Committee's note, subdivision (C)(3)(1966)), citing Restatement of Judgments § 86, comment (h), § 116 (1942); *accord Sam Fox*

(continued...)

Thus, the Court of Appeals found that if the class certified in *HRC* included respondents, the class certification was improper. Pet. App. at 7a; *id.* at 94a. The "screened-out" and "screened-in" Haitians neither shared the same interest in challenging screening nor suffered the same injury from it. Because respondents were or would be "screened-in," the "screened-out" *HRC* plaintiffs could not have adequately represented them.[81] *See, e.g., East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977), quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974).

In addition, respondents are different parties because the *HRC* class included only those Haitians who were or would be "detained . . . pursuant to the United States Interdiction Program" in effect at the time of *HRC*. After the Kennebunkport Order, the Court of Appeals held, that program no longer exists. Pet. App. at 9a-10a. Respondents are refugees now in Haiti—who either were "screened-in," or would flee and be screened in if screening were reinstituted—who cannot flee because of the *new* interdiction program of forced summary return.

Petitioners formalistically claim that the "United States Interdiction Program" in the *HRC* class definition refers to any "program of interdiction" established pursuant to Proclamation 4865 and thus embraces both the discarded program of preliminary

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80(...continued)
Publishing Co., Inc. v. United States, 366 U.S. 683 (1961). Nor did respondents, most of whom were in Haiti when *HRC* was filed, have reason, opportunity, or legal obligation to challenge the overinclusive class. *See Martin v. Wilks*, 490 U.S. 755 (1989); *Sam Fox Publishing Co., Inc. v. United States*, 366 U.S. 683 (1961).

81*See General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 156-57 (1982); *United Indep. Flight Officers, Inc. v. United Air Lines*, 756 F.2d 1274, 1284 (7th Cir. 1985); *Carroll v. American Fed'n of Musicians*, 372 F.2d 155, 161-62 (2d Cir. 1967). In *Falcon*, this Court decertified a class of both employees and applicants for employment where the only class representative was an employee. 457 U.S. at 147. The Court, rejecting "across the board" claims, held that employees could not claim to represent applicants unless "the discrimination manifested itself in hiring and promotion practices in the same general fashion . . ." *Id.* at 159 n.15. Similarly, the *HRC* plaintiffs did not challenge any general policy affecting "screened-ins," and "screened-ins" were not denied the rights which plaintiffs sought.

screening before return and the current program of forced, summary return. Pet. Br. at 20, n.12. As the *HRC* courts understood, however, the "United States Interdiction Program" at issue in *HRC* was a program of interdiction, *screening* and repatriation established by Executive Order 12,324.[82] Proclamation 4865 announces only the President's decision to suspend entry and interdict boats on the high seas, making no reference to the range of lawful or unlawful actions that might follow an interdiction. For ten years, this proclamation was the basis for the program established by Executive Order 12,324; since May 24, the proclamation instead announced the Kennebunkport Order, which "revoked and replaced" the previous executive order, Pet. App. at 263a, with the new program of summary return. To suggest that the two programs are the same is like suggesting that a program of lawful incarceration and cruel and unusual punishment are the same, so long as both cite the same presidential proclamation as authority. Because respondents are not being processed pursuant to the same program as the *HRC* plaintiffs, they cannot be members of the *HRC* class.

Finally, petitioners claim inequity, arguing that if the Eleventh Circuit had ruled for the plaintiffs in *HRC*, "the government could hardly have escaped the preclusive effect of that judgment by eliminating refugee screening . . . ." Pet. Br. at 26-27. But if petitioners had lost in *HRC*, they would now be arguing that respondents were not properly part of the *HRC* class, invoking *United States v. Mendoza*, 464 U.S. 154, 162 (1984) (offensive non-mutual collateral estoppel cannot be maintained against government). Because the Eleventh Circuit in fact ruled for petitioners, they now argue that the *HRC* class enveloped all Haitians who might ever flee from Haiti. In short, *petitioners*, not respondents, promote inequity by asking this Court to deny the

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82In *HRC*, the Florida district court noted that Executive Order 12,324, not the proclamation, "sets forth the *interdiction program*." 789 F. Supp. 1552, 1570 (S.D. Fla. 1991). The Eleventh Circuit agreed: "The Executive Order was issued specifically to establish a procedure for interdiction of Haitian migrants on the high seas. The *program* was intended as an emergency measure to deal with a situation that the President determined to be detrimental to the interests of the United States." Pet. App. at 217a (emphasis added).

"screened-in" Haitians their day in court to challenge the Kennebunkport Order.[83]

B. The Second Circuit Did Not Abuse Its Discretion in Declining to Apply Collateral Estoppel in Light of the Equitable Considerations and Changed Circumstances of This Case

Courts have "broad discretion" to deny application of collateral estoppel. *Parklane Hosiery*, 439 U.S. at 331. Because "[t]he actual decision whether to apply collateral estoppel undoubtedly involves equitable considerations . . . [it] is therefore subject to review under an abuse of discretion standard." *In re McWhorter*, 887 F.2d 1564, 1566 (11th Cir. 1989).[84] Petitioners ask this Court to redetermine the Second Circuit's ruling *de novo*, never addressing the Second Circuit's conclusion that the combined weight of equitable considerations justifies relitigating the legal issues. Pet. App. 11a-14a. For four reasons, the Second Circuit did not abuse its discretion when it decided that, "even if all of the requirements for issue preclusion [were] met," equitable considerations rendered collateral estoppel inappropriate. Pet. App. at 11a.

First, when deciding "pure questions of law," this Court has always weighed the equities to determine whether "preclusion may be inappropriate." *Montana v. United States*, 440 U.S. 147, 162 (1979). In such cases, courts often find that the goals of finality and judicial economy, which typically justify preclusion, are outweighed by other considerations. The court of appeals specifically found that the more flexible doctrine of *stare decisis* adequately protected the interests of the litigants, rendering estoppel unnecessary. Pet. App. at 12a. Petitioners claim that the court of appeals' ruling has not saved judicial resources, but any waste of

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83 Restatement (Second) of Judgments § 28(2) (1982) ("a new determination is warranted in order to . . . avoid inequitable administration of the laws").

84 *Accord McLendon v. Continental Can Co.*, 908 F.2d 1171, 1177 (3d Cir. 1990); *United States v. Kaytso*, 868 F.2d 1020, 1022 (9th Cir. 1989); *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 172 (5th Cir. 1985); *Jack Faucett Assocs. v. American Telephone & Telegraph Co.*, 744 F.2d 118, 125 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985).

judicial resources here has resulted not from the courts' refusal to apply collateral estoppel, but from petitioners' persistence in lawless conduct.

Second, in *Mendoza*, 464 U.S. at 160, this Court noted that "[a]llowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." *See also E.I. du Pont de Nemours v. Train*, 430 U.S. 112, 135 n.26 (1977). Collaterally estopping different circuits from redeciding pure legal issues "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *Mendoza*, 464 U.S. at 160. This concern is particularly serious when class relief is sought and the first decision is as shallow and erroneous as *HRC*.

In this case, the *HRC* class certification was so broad that it would preclude any litigation of the extraterritorial application of § 243(h). Because the Haitian interdiction program is unique, it is unlikely any other group will be able to challenge the Eleventh Circuit's ruling that the United States has no extraterritorial obligations to refugees.[85] To mandate estoppel here would forever bar this Court from deciding an important issue on which the Second and Eleventh Circuits are squarely divided. To forestall that possibility, this Court would have to grant *certiorari* the first time important legal issues are raised in order to preserve its ability to decide them. This would substantially dilute the well-established practice of percolation, whereby multiple courts of appeals can pass upon an issue before the Supreme Court grants certiorari.

Third, the Second Circuit properly weighed petitioners' prior representation to this Court when they successfully opposed *certiorari* months ago in *HRC*.[86] The Second Circuit emphasized

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85 Haitians are currently the only group interdicted on the high seas and returned to a country in which they face persecution. Although the United States also interdicts Cubans, it does not return them. Therefore, unless the United States begins interdicting and returning another class of people, there will never be another chance to relitigate the applicability of § 243(h).

86 At that time, the Solicitor General expressly represented that "screened-in" individuals would be brought to the United States so that they could file applications under the INA for asylum. *See* Brief for United States in

(continued...)

that it was concerned not with the denial of review, but with the circumstances surrounding the denial of review. Petitioners made a representation to this Court to persuade it to deny *certiorari*.[87] It now seeks to deny this and any other court the opportunity to review an entirely new policy. As Judge Newman wrote in his concurring opinion, which Judge Pratt joined:

> the Government cannot fend off such review on a promise to pursue one policy, then abandon that policy, and then use that unreviewed decision, insulated from review by a representation no longer being honored, to obtain a collateral estoppel ruling from this Court as to the lawfulness of the new policy.

Pet. App. at 41a.

Finally, petitioners claim that "a change in the defendants' own conduct manifestly does not constitute an 'intervening change' in the controlling principles under which the legality of that conduct must be evaluated." Pet. Br. at 22. But our claim is different: preclusion is inappropriate where, as here

> [t]here is a clear and convincing need for a new determination of the issues (a) because of the potential adverse impact of the determination on the public interest [or]. . . (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action . . .

86(...continued)
Opposition to Certiorari at 3, *HRC v. Baker, cert. denied*, 112 S. Ct. 1245 (1992). Only five days after this Court denied *certiorari*, and judicial oversight ended, petitioners announced that it would not bring to the United States certain refugees found to have credible fears, and began rescreening those refugees on Guantanamo and returning them to Haiti. Less than three months later, the President issued the Kennebunkport Order, and petitioners announced that no interdicted Haitians, whether or not they had credible fears, would be brought to the United States.

87Petitioners' representation was material, because this Court may reasonably have determined that § 243(h) was not directly implicated by petitioners' conduct. For, even if petitioners made some mistakes in screening, they were bringing to the U.S. anyone who demonstrated a "credible" fear of persecution. Thus, petitioners were unlikely to return to Haiti anyone who could prove under § 243(h) that it was more likely than not that his life or freedom would be threatened.

Restatement (Second) of Judgments § 28(5) (1982).

Petitioners concede that the executive policy now under challenge represents a change from "the government's then-current practice" when *HRC* was decided, but argue that "the entire thrust of the government's position was that the President must retain flexibility to respond to international developments free from judicial interference." Pet. at 16 n. 11. In fact, the program of preliminary screening before return had been in place for more than a decade, and the "thrust" of the Solicitor General's earlier position was that this Court should not interfere with the Executive's "longstanding policy" of interdicting and screening Haitian refugees, particularly when "screened-in" refugees were being brought to the United States for asylum hearings accompanied by the full panoply of procedural rights. *See* Brief for United States in Opposition to Certiorari at 8, 10, *HRC v. Baker, cert. denied*, 112 S. Ct. 1245 (1992) (J.A. at 252, 258). For preclusion purposes, the critical question is not whether petitioners knew that a representation was false when made, but whether circumstances have so changed *after that time* as now to make it inequitable to permit petitioners to escape judicial review of their subsequent actions.

Since *HRC*, petitioners have dispensed with screening altogether under the Kennebunkport Order. The interdiction policy now under challenge did not exist—and hence could not be subjected to judicial review—in any prior action. When *HRC* was decided, it was not foreseeable that the § 243(h) issue would arise again in the context of a subsequent action challenging a policy of forced summary return. Moreover, given the Eleventh Circuit's error and the importance of the legal issue, there is clearly a need for a new determination of the issues because of the potential adverse impact of the determination on the public interest. If petitioners had their way, a litigant could test the legality of a comparatively benign practice, then invoke collateral estoppel to hide behind that ruling in a subsequent action challenging an egregiously lawless practice that had not been implemented, announced or even hinted at when the prior practice was being adjudicated. As the Second Circuit correctly reasoned:

> [W]hen the United States (a) resists Supreme Court review on a dramatic issue of such public import ..., by representing that

there will be screening of intercepted aliens followed by full consideration of asylum rights, (b) achieves the desired denial of *certiorari*, and then (c) embarks on a completely contrary policy, that is a change of the type that ought to permit an inferior court, unfettered by estoppel, to adjudicate the merits of a new case based on the new circumstances.

Pet. App. at 14a.

III. NOTHING IN THE ADMINISTRATIVE PROCEDURE ACT OR THE IMMIGRATION AND NATIONALITY ACT DIVESTS THE DISTRICT COURT OF ITS AUTHORITY TO REVIEW OR ISSUE INJUNCTIVE RELIEF IN THIS CASE

To mask the weakness of their collateral estoppel argument, petitioners develop two new claims of nonreviewability before this Court. They claim first, that the INA "impliedly precludes" judicial review under the APA, 5 U.S.C. § 701(a)(1), and second, that 5 U.S.C. § 702(1) required the district court to deny injunctive relief and dismiss this suit before reaching the merits. Both assertions are wrong.

A. The Immigration and Nationality Act Does Not Preclude Judicial Review of Petitioners' Policy of Forced, Summary Return

The APA confers on "a person . . . adversely affected or aggrieved by agency action" a cause of action for injunctive relief against executive branch officials. 5 U.S.C. § 702 (1988). Neither territorial nor citizenship limits restrict the availability of APA review. Nonresident aliens located outside of the U.S. qualify as "persons aggrieved by agency action" entitled to obtain review in U.S. courts of the legality of U.S. governmental acts.[88]

88*See, e.g., Constructores Civiles de Centroamerica, S.A. v. Hannah*, 459 F.2d 1183, 1191-92 (D.C. Cir. 1972); *DKT Memorial Fund Ltd. v. A.I.D.*, 691 F. Supp. 394, 400 (D.D.C. 1988) ("[T]he Court finds [foreign plaintiffs] have standing to assert their claims under the . . . APA."), *aff'd in pertinent part, rev'd in part*, 887 F.2d 275, 281-82 (D.C. Cir. 1989); *People of Saipan v. United States Dep't of Interior*, 356 F. Supp. 645, 653 (D. Haw. 1973) ("[T]his court will not deny plaintiffs standing in this suit because of their status as nonresident aliens where no such congressional intent is manifested in . . . the

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Particularly in the immigration context, courts have permitted aliens located outside of the United States to obtain review of the legality of U.S. government actions adversely affecting them.[89]

The APA authorizes reviewing courts, at the request of aggrieved persons, to "hold unlawful and set aside agency action . . . found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional . . . power . . . [or] (c) in excess of statutory authority." *Id.* § 706(2). As we have shown, petitioners' forced repatriation policy plainly constitutes final "agency action" that violates § 243(h) and lacks both statutory and constitutional authority. Pet. App. at 35a-38a. The action is final because "the agency has completed its decisionmaking process, and . . . the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2773 (1992). As persons aggrieved by that policy, respondents undeniably have standing to challenge that agency action.[90] Accordingly, the Court of Appeals acted properly by reviewing petitioners' policy and "hold[ing it] unlawful and set[ting it] aside." *Id.* § 706(2).

Petitioners now claim that the INA "impliedly" precludes judicial review under 5 U.S.C. § 701(a)(1).[91] This claim flies in

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88(...continued)
APA."), *aff'd as modified*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975). *See generally* cases cited in Brief *Amicus Curiae* of American Immigration Lawyers' Association (AILA) at Part IIC.

89*See, e.g., Silva v. Bell*, 605 F.2d 978, 984-85 (7th Cir. 1979) (class of visa applicants including aliens living in Mexico granted APA review of INS interpretation of statute allocating visas); *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977) (reviewing legality of deportation order on behalf of alien located abroad); *Suarez v. INS*, 732 F.2d 58 (6th Cir. 1984) (same). *See generally* cases cited in AILA Brief at Part IIIA.

90*See generally* cases cited in AILA Brief at Part III (discussing respondents' standing). Petitioners do not challenge, and have not challenged, respondents' standing to bring this action. The issue of standing is, however, raised in Brief *Amicus Curiae* of FAIR, but is soundly rebutted by AILA Brief at Part III. Respondents incorporate AILA's arguments by reference here.

91Section 701(a)(1) of the APA states: "This chapter applies, according to the provisions thereof, except to the extent that . . . statutes preclude judicial review." Significantly, the opinion below rejected this claim without discussion and both the Second Circuit here and the Eleventh Circuit in *HRC* have,

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the face of the settled principle that section 702 of the APA creates a strong presumption favoring judicial review of all final agency actions. Second, petitioners fail to overcome the heavy presumption in favor of reviewability by demonstrating either an explicit or an implicit congressional intent to preclude judicial review.

This Court has unanimously declared its strong presumption that Congress intends judicial review of administrative action.[92] Applying the presumption, the Court has repeatedly held that APA review is available in suits brought against foreign affairs and immigration-related policies.[93] The strong presumption in favor of

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91(...continued)
without regard to this claim, reviewed the legality of the various Haitian interdiction programs on the merits. The Second Circuit's decision contains no holding or analysis of any kind about the APA or the availability of judicial review under it. Nor did the Eleventh Circuit in *HRC* accept petitioners' analysis of the APA. By rejecting plaintiffs' § 1253(h) claim "on the merits" after denying judicial review under the APA, petitioners effectively recognized that the plaintiffs had a cause of action *independent* of the APA. Pet. at 14 n.7.

92*See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) ("[w]e begin with the strong presumption that Congress intends judicial review of administrative action. . . [O]ur cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."), *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967). This presumption is so strong that even when Congress bars judicial review explicitly, where the equities are compelling, "even this most unambiguous of Congressional statements precluding judicial review would be overcome." *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976).

93*See, e.g., McNary v. Haitian Refugee Ctr.*, 111 S. Ct. 888 (1991); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986). *See also Pancho Villa Restaurant, Inc. v. United States Dep't of Labor*, 796 F.2d 596 (2d Cir. 1986); *Dina v. Attorney General*, 793 F.2d 473, 476-77 (2d Cir. 1986); *Shoreham Cooperative Apple Producers Ass'n Inc. v. Donovan*, 764 F.2d 135 (2d Cir. 1985). Petitioners' reliance on *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988) is misplaced. That case involved the issuance of a security clearance, "a sensitive and *inherently discretionary judgment call [which] is committed by law* to the appropriate agency of the Executive Branch" (emphasis added). The *Egan* court added that "[i]t should be obvious that no one has a 'right' to a security clearance," 484 U.S. at 528, and stated: "it is not reasonably possible for an outside non-expert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence." *Id.* at

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judicial review of administrative action does not evaporate in a case involving construction of the INA.[94] In *McNary*, this Court declared that the INA's restrictions on judicial review of individual adjudications must not be read to preclude judicial review of general policies, practices or procedures affecting the rights of aliens, in "the absence of clear congressional language mandating preclusion." 111 S. Ct. at 892. In this case, no such clear congressional language mandating preclusion exists. Accordingly, petitioners have not provided the "clear and convincing evidence" necessary to overcome the presumption of reviewability. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967).

1. Petitioners Cannot Demonstrate an Express Congressional Intent in the INA to Preclude Review

Petitioners argue that by enacting and amending the INA, Congress intended to statutorily preclude all APA review of the legality of agency actions affecting refugees located outside of the U.S.[95] Pet. Br. at 14-15. However, the text and structure of the INA give rise to no such inference and petitioners can point to no provision that expressly limits judicial review here. The only provision they cite, 8 U.S.C. § 1105a, makes review in the courts of appeal the exclusive procedure for "judicial review of all *final orders of deportation*," *id.* § 1105a(a) (emphasis added), while § 1105a(b) makes habeas corpus the sole mode of judicial review of a final order of exclusion. Significantly, neither provision precludes judicial review of governmental conduct towards aliens that arises wholly outside the deportation or exclusion process. Nor does either procedure preclude judicial review of government

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93(...continued)
529. Here, respondents do have a right to *non-refoulement* and it is possible to review the question whether petitioners' policy of forced, summary return complies with section 243(h) and the treaty. These determinations, unlike those in *Egan*, are not committed by law to agency discretion.

94*See McNary v. HRC*, 111 S. Ct. 888 (1991); *Jean v. Nelson*, 472 U.S. 846 (1985); *Marcello v. Bonds*, 349 U.S. 302 (1955).

95 This alleged objection pertains only to the availability of APA review of plaintiffs' claim under § 243(h). Thus, defendants implicitly acknowledge that no such bar to APA review exists for plaintiffs' claims under Article 33, the U.S.-Haiti agreement, and the Fifth Amendment.

policies, as opposed to individual deportation or exclusion orders. Thus, by its terms and as consistently applied by this Court, § 1105a does not bar judicial review of claims such as those here, which are wholly unrelated to deportation or exclusion proceedings and which challenge not the review of *individual* case adjudications, but a new executive policy of forced return without agency procedures.[96] Courts have routinely reviewed a wide range of immigration decisions and practices that occur outside deportation proceedings and for which no specialized INA statutory review provisions exist.[97]

Nor can petitioners plausibly claim that Congress has expressed some general "unwillingness to permit judicial review of immigration decisions concerning aliens outside the United States who have 'never presented [themselves] at the borders.'" Pet. Br. at 15. They can cite no clause in the INA that expressly forecloses review in such circumstances, resting on a single line of dictum in a footnote of a thirty-six year-old case, *Brownell v. Tom We Shung*, 352 U.S. 180, 184 n.3 (1956). Yet placed in context, *Tom We Shung* suggests nothing of the kind. The question there was whether an alien child of a serviceman could challenge exclusion by declaratory judgment rather than habeas corpus review. The Court answered yes, but cautioned that declaratory relief might not be available to "an alien who has never presented himself at the

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96*See McNary v. Haitian Refugee Center*, 111 S. Ct. 888 (1991); *Jean v. Nelson*, 472 U.S. 846 (1985); *INS v. Chadha*, 462 U.S. 919, 937-39 (1983) (§ 1105a governs review of matters "on which *the final order* is contingent") (emphasis added). *See generally* T.A. Aleinikoff & D. Martin, *Immigration Process and Policy*, 854-62 (2d ed. 1991).

97*See, e.g., ILWU v. Meese*, 891 F.2d 1374 (9th Cir. 1989); *Pancho Villa Restaurant, Inc. v. United States Dep't of Labor*, 796 F.2d 596 (2d Cir. 1986); *Dina v. Attorney General*, 793 F.2d 473 (2d Cir. 1986); *Parcham v. INS*, 769 F.2d 1001 (4th Cir. 1985); *Shoreham Cooperative Apple Producers Ass'n v. Donovan*, 764 F.2d 135 (2d Cir. 1985); *International Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798 (D.C. Cir. 1985); *Carnejo-Molina v. INS*, 649 F.2d 1145 (5th Cir. 1981). Petitioners' reliance on *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984), *quoted in* Pet. Br. at 13-14, is similarly misplaced, because respondents seek review of an unlawful immigration *policy* of summary return without screening, not "particular issues," e.g., a final administrative order of deportation, for which the INA has established a "detailed mechanism for judicial review." Pet. Br. at 15, quoting *Block*, 467 U.S. at 351.

borders of this country." In 1961 Congress enacted section 1105a(b), which overruled *Tom We Shung* and removed the availability of declaratory relief to challenge exclusion orders. But by so acting, Congress nowhere expressed some broad unwillingness to preclude all APA review for aliens who have not presented themselves at our borders.

> Thus, petitioners mislead the Court when they suggest that
>
> [i]n light of Congress' preclusion of review under the APA even for aliens who have reached our borders, it follows *a fortiori* that aliens who have never reached our borders may not invoke the APA to challenge governmental actions in connection with their efforts to enter the United States.

Pet. Br. at 16.[98] Petitioners' premise is wrong because Congress has not precluded review under the APA for aliens who have reached our borders. Although Congress has channeled judicial review of individual deportation and exclusion orders into particular modes, APA review remains for general challenges to immigration policies. Similarly, petitioners' conclusion is wrong for the simple reason that respondents sue here not to gain entry, but to prevent their forced return to Haiti, a general policy for which APA review

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98Petitioners seek support for this claim in the narrow and anomalous rule against reviewability of visa decisions by consular officials. Pet. Br. at 15 n.8. As *Amicus* AILA points out, this doctrine is a historical anomaly that cannot be elevated into a blanket bar against judicial review of an interdiction policy that is set by *nonconsular* executive officials. Moreover, it applies only to exercises of consular discretion with regard to individual visas and does not foreclose judicial review of generally applicable INS policies like the one under challenge here. The doctrine applies without regard to whether the alien visa applicant is located in the U.S. or abroad, and thus cannot be read to reflect some general congressional intent to deny APA review to claims of aliens outside the United States. *See, e.g., Burrafato v. United States Dep't of State*, 523 F.2d 554 (2d Cir. 1975), *cert. denied*, 424 U.S. 910 (1976) (alien inside United States facing deportation proceedings denied judicial review of consul's decision); *United States ex rel. London v. Phelps*, 22 F.2d 288 (2d Cir. 1927), *cert. denied*, 276 U.S. 630 (1928) (same for alien in exclusion proceedings); *Pena v. Kissinger*, 409 F. Supp. 1182 (S.D.N.Y. 1976) (same for alien outside and spouse inside United States). Finally, this doctrine is now rooted in a specific statutory provision concerning consuls, 8 U.S.C. §§ 1104(a), 1201. It lends no support to the claim that there exists a general statutory bar to judicial review of immigration decisions by other officials.

is available to any aggrieved person. Congress has never expressed any blanket intent to foreclose judicial review of actions by petitioners that would, through interdiction and repatriation, totally prevent aliens from presenting themselves at our borders.

2. Petitioners Cannot Demonstrate an Implied Congressional Intent in the INA to Preclude Review

Petitioners also argue that both the nature of the administrative action they challenge and the type of problem involved favor barring judicial review here. Pet. Br. at 17-18. But when preclusion of judicial review is involved, the issue is not merely executive convenience, but congressional intent. Petitioners identify no congressional intent to preclude judicial review "fairly discernible" in the statutory scheme of § 243(h). *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984).

Nor do petitioners establish implied preclusion under § 243(h) by noting that Congress provided overseas refugees no judicial review of their claims under § 207. In fact, all three key provisions of the Refugee Act, §§ 207, 208, and 243(h), are equally silent on the issue of judicial review and evidence no general or specific congressional intent to target overseas refugees for denial of procedural rights.[99] Legislative silence alone cannot be read to preclude judicial review, particularly when Congress passed the APA "[with the general purpose] to remove obstacles to judicial review of the agency action under subsequently enacted statutes like the 1952 Immigration Act." *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955). Thus, "[t]he existence of an express preclusion of judicial review in one section of a statute [regarding deportation and exclusion]. . .is not conclusive with respect to reviewability

99 It is because of a separate statutory provision, INA § 106, 8 U.S.C. § 1105a (J.A. at 334-39), that decisions with respect to exclusion and withholding of deportation are reviewable. Section 106 expressly provides for review of INS orders of deportation and exclusion and did so before either the U.S. ratification of the Refugee Protocol or the passage of the Refugee Act of 1980. This provision serves as a vehicle for reviewing decisions on § 208 asylum and § 243(h) withholding of deportation only because these forms of relief may be requested in the course of exclusion and deportation proceedings.

under other sections of the statute," such as § 243(h). *Morris v. Gressette*, 432 U.S. 491, 506 n.22 (1977).[100]

In the end, petitioners argue that their violations of § 243(h) are unreviewable, because they represent foreign policy or military determinations of the President. Pet. Br. at 18. When immigration matters touch foreign affairs, they argue, this Court should invert the normal presumption of reviewability and treat the matter as unreviewable "in the absence of the clearest expression of congressional intent to allow them to do so." *Id.* This Court has never recognized such a perverse "clear statement" rule. The Court regularly reviews claims that executive branch officials have violated the immigration statutes, without regard to the foreign policy consequences. *See, e.g., INS v. Doherty*, 112 S. Ct. 719 (1992); *Jean v. Nelson*, 472 U.S. 846 (1985). The fact that the President's agents are forcibly returning Haitians based upon the altogether distinct statutory authority to restrict entry is a reason to invalidate that action, not hold it unreviewable. *See* Pet. Br. at 17 (citing §§ 212(f) and 215 of the INA). *See also Amicus Brief* of AILA, Part IV. Similarly, the fact that the President has acted by executive order does not insulate petitioners' action from APA review. Unlike *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), this suit challenges not the discretionary actions of the President, but the acts of lower level officials located within APA agencies, principally the Justice Department and the Coast Guard, that violate the mandatory *non-refoulement* language of § 243(h) and Article 33. The President's executive order nowhere commands petitioners to return Haitian refugees summarily to Haiti; it merely leaves that decision to their allegedly "unreviewable discretion." Kennebunkport Order, § 2(c)(3). The question whether those officials have exercised their discretion in violation of an unambiguous statutory mandate is hardly one that is immune from judicial review. As Justice White wrote for this Court in *Japan*

100 "'The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.'" *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) (quoting L. Jaffe, *Judicial Control of Administrative Action* 357, 336-59 (1965)).

Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 (1986):

> We are cognizant of the interplay between these [statutes] and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.

B. Nothing in 5 U.S.C. § 702(1) Requires the District Court to Dismiss This Action or to Deny Equitable Relief

Petitioners finally assert, virtually without argument, that the judicial review provision of the APA somehow imposes a duty upon the district court to deny injunctive relief and dismiss this suit, without reaching the merits. Pet. Br. at 55-57, n.45. For this novel proposition, petitioners rely upon the last sentence of 5 U.S.C. § 702(1), which provides that "[n]othing herein . . . affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground."

By its terms, the provision serves as a savings clause designed to preserve, not shrink, the scope of review and equitable discretion of federal courts reviewing agency action. The provision expresses congressional intent not to alter a court's traditional equitable discretion or to abrogate various preexisting limits to judicial review, such as standing and justiciability.

The legislative history of 5 U.S.C. § 702(1) underscores that the provision lacks independent content.[101] Nor does the legislative history anywhere reflect the sort of blind deference to

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101 The House Report declares that the provision "was not intended to affect or change defenses other than sovereign immunity" and all other defenses "remain unchanged." H.R. Rep. No. 1656, 94th Cong., 2d Sess. 12 (1976). *See also Hearing Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970).

executive prerogatives that petitioners advocate.[102] No court that has considered the Haitian refugee litigation has relied upon this provision.[103] Nor to our knowledge, has any court ever accepted petitioners' claim that this provision acts, of its own force, as a "fundamental limitation" on equitable relief in immigration cases that touch upon foreign affairs. Pet. Br. at 56.[104] To the contrary, federal courts routinely grant injunctions in immigration cases.[105]

102*See, e.g.*, S. Rep. No. 996, 94th Cong., 2d Sess. 3 (1976) ("To the extent that this obsolete [sovereign] immunity doctrine prevents the orderly, rational review of actions of Federal officers, it is inconsistent with the principles of accountable and responsive Government.").

103 Nor has this issue been fully briefed or argued in any court. Indeed, petitioners' brief below contains only one short paragraph referring to section 702(1) of the APA. *See* Pet. Br. at 62.

104 None of cases cited by the Solicitor General, *see* Pet. Br. at 56 n.45, support this novel proposition. In *American Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989) (per curiam), this Court vacated and remanded a district court ruling, but nowhere cited 5 U.S.C. § 702(1), nor suggested that the district court should dismiss the case as inappropriate for injunctive relief. "[W]here, as here," the Court cautioned, "a case implicates the fundamental relationship between the Branches, courts should be extremely careful not to issue *unnecessary constitutional rulings*," a ruling plainly irrelevant to the question of statutory construction here (emphasis added). Similarly, *Webster v. Doe*, 486 U.S. 592, 604-05 (1987), revolved not around § 702(1), but whether a section of the National Security Act precluded judicial review under § 701(a)(2) of the APA. Without mentioning § 702(1) or requiring dismissal of the suit on national security grounds, Chief Justice Rehnquist reaffirmed that "traditional equitable principles requiring the balancing of public and private interests control the grant of . . . injunctive relief." 486 U.S. at 604-05. Similarly, petitioners cite *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985) for their claim that lower federal courts have a broad roving power to deny equitable relief to aliens outside the United States. But in *Sanchez-Espinoza*, plaintiffs sought equitable relief against federal officials to stop torts committed by U.S-funded military actors during a war in Nicaragua. No federal statute, such as § 243(h), imposed a mandatory duty on executive officials that the court could enforce.

105*See, e.g., Haitian Refugee Center v. Nelson*, 694 F. Supp. 864, (S.D. Fla. 1988), *aff'd*, 872 F.2d 1555 (11th Cir. 1989), *aff'd sub nom. McNary v. HRC*, 111 S. Ct. 888 (1990) (enjoining INS from applying procedures in Special Agricultural Worker application process depriving applicants of constitutional and statutory rights); *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982) (enjoining INS from depriving Haitians of due process by accelerating asylum and deportation proceedings); *Orantes-Hernandez v.*

(continued...)

Unless statutes clearly intend to alter the courts' equitable discretion, they should not be so read, because "a major departure from the long tradition of equity practice should not be lightly implied." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982).

In this case, the district court applied traditional standards for injunctive relief and found, as a matter of fact, that petitioners "undeniably [made] a substantial showing of irreparable harm." Pet. App. at 166a. Petitioners did not even contest that factual finding before the Second Circuit, which reiterated that "heightened political repression [is] currently occurring in Haiti [and that] specific plaintiffs who had been returned have since been abused, were tortured and were in hiding in fear for their lives." *Id.* at 5a, 6a. Under the "two-court rule," these unchallenged factual findings deserve substantial deference from this Court. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *United States v. Ceccolini*, 435 U.S. 268, 273 (1978). This Court should not now sit as a court of first instance to entertain petitioners' specious factual assertions. "This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues." *Berenyi v. District Director*, 385 U.S. 630, 636 (1967).[106]

In short, nothing supports petitioners' claim that Congress sought in 5 U.S.C. § 702(1) to create a vague, standardless judicial discretion to deny equitable relief. Absent statutory underpinning,

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105(..continued)
Meese, 685 F. Supp. 1488 (C.D. Cal. 1988), *aff'd sub nom. Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) (permanently enjoining INS from procedures exhibiting pattern and practice of violating rights of aliens held in INS custody).

106 The Government's concern that *our clients* will suffer loss of life rings particularly hollow, when those clients would themselves risk flight rather than languish in suicidal conditions in Haiti. Similarly, petitioners' claim that the injunction will "recharge the migrant crisis" ignores their own admissions at oral argument before the Second Circuit that "there is no doubt multiple causation for individuals leaving" Haiti. Tr. of Oral Argument, *HCC I*, at 29 (statement of Assistant Attorney General Gerson). *Accord* Tr. of May 29 Oral Argument at 61 (statement of Solicitor General Starr) ("we have never said that there are not other factors causing the migration" in addition to judicial injunction).

petitioners' argument reduces to the claim that lower federal courts possess free-floating power—in the name of separation of powers—to find immigration injunctions "inappropriate" and dismiss complaints even when actions of INS and other executive officials plainly violate statute and treaty. *See generally* Pet. Br. at 56-57. The Second Circuit soundly rejected this claim. Pet. App. at 38a. This case involves a straightforward question of statutory interpretation. Courts undeniably have the power to review executive acts in the immigration field that are not authorized by or consistent with congressional directives.[107]

Similarly, the Second Circuit correctly rejected petitioners' overblown claims that the injunction will interfere with the President's conduct of foreign, military or diplomatic policy.[108] The Court of Appeals found that Congress, in the exercise of its "'complete,' 'plenary' legislative power over immigration matters . . . has spoken directly to the question at issue so that '[t]his is a job for the Nation's lawmakers, not for its military authorities.'" Pet. App. at 37a (citations omitted). The injunction merely clarifies that the Kennebunkport Order is not the only law in this area. An executive order cannot confer upon the President's subordinates unfettered discretion to violate § 243(h), a duly enacted statutory provision carefully crafted by both Congress and the President.

Likewise, petitioners assert that the injunction "undermine[s] the ability of this Nation to speak with one voice." Pet. Br. at 57. But the Senate and the President spoke with one voice when they ratified Article 33 and enacted § 243(h). Petitioners are now disrupting that single voice by acting in violation of both the statute and the treaty.

In sum, neither statute nor judicial precedent authorize lower federal courts to refuse to enforce the law or to exercise an

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107 Particularly in immigration cases, the "judiciary is the final authority on issues of statutory construction." *INS v. Cardoza-Fonseca*, 480 U.S. at 447 (quoting *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)).

108 As the Second Circuit pointed out, those claims are rendered all the more suspicious by § 3 of the "executive order [which] specifically states that it was 'intended only to improve the internal management of the Executive Branch.'" Pet. App. at 37a.

unchecked and unchartered power to dismiss cases that are properly before them. Where, as here, "the enjoined defendant is a responsible government officer residing in the nation's capital, who by virtue of his oath of office is sworn to uphold the . . . laws of the United States," *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1510 n.29 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985), "it is the role of the courts within the constitutional scheme to adjudicate and remedy claims of actual injury resulting from specific, unlawful Executive action." *Id.* at 1531 (emphasis in the original).[109]

Finally, petitioners cannot protest based on claims of presidential flexibility. Pet. Br. at 56. Even before the injunction issued, the President lacked the "flexibility" to act in violation of the INA. The injunction does not meaningfully limit the President's foreign policy options; it merely removes an illegal policy option that no government official is free to choose.

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109 As in *Ramirez*, the injunction here does not run extraterritorially, but "against officials of the United States government present in Washington, D.C." 745 F.2d at 1531. Petitioners cite the dissenting opinion in *Ramirez*, ignoring the *en banc* majority's conclusion that "the foreign affairs context of Executive action cannot shield unlawful conduct from judicial inquiry." *Id.* at 1530. *Ramirez* did not apply 5 U.S.C. §702(1), but rather, held that a federal court "must take jurisdiction" of a complaint that "is neither insubstantial nor frivolous." *Id.* at 1533. With regard to injunctive relief, the *Ramirez* majority cited a "long line of cases that permit judicial relief for unlawful . . . action by officials of the Executive Branch of the government, including relief against unlawful actions taken in the context of foreign and military affairs." *Id.* at 1530 (collecting cases).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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APPENDIX

No. 92-344

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GENE McNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, *ET AL.*,

Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., *ET AL.*,

Respondents.

AFFIDAVIT OF LOUIS HENKIN

I, Louis Henkin, swear under penalty of perjury that the following is true and correct to the best of my knowledge and recollection:

1. I am University Professor Emeritus and Special Service Professor at Columbia University, where I have taught since 1962. I have taught constitutional law, international law, the law of American foreign relations, and human rights law. I am also currently the President of the American Society of International Law. Before coming to Columbia, I was a law clerk to Justice Felix Frankfurter (from 1946-47), a Foreign Affairs Officer at the United States Department of State (from 1945 to 1946 and 1948-1957), a Consultant to the United Nations Legal Department (from 1947-48), and a professor at the University of Pennsylvania Law School (from 1957-62). I have published numerous books and articles on foreign affairs and the constitution, international human rights, and public international law, including *Cases and Materials on International Law* (ed. with R. Pugh, O.

Schachter & H. Smit), and *International Law: Politics, Values and Functions* (1989). From 1978 to 1984, I served as Co-Editor-in-Chief of the *American Journal of International Law*. From 1979 to 1987, I served as the Chief Reporter of the *Restatement (Third) of the Foreign Relations Law of the United States*.

2. During my years at the State Department, I was designated to serve as the United States Representative to the United Nations *Ad Hoc* Committee on Statelessness and Related Problems. The Committee was responsible for drafting a convention relating to the status of refugees, which ultimately became the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 ("Refugee Convention"). I actively participated as the United States delegate in all of the meetings of the Committee.

3. Section 2 of Executive Order No. 12,807 states that the terms of Article 33 of the Convention "do not extend to persons located outside the territory of the United States." I know no basis for that view. There is nothing to support it in the language of Article 33 or in the record of the proceedings of the Committee that drafted it. I do not recall any expression to that effect by any member of the Committee. In my view, that conclusion would be contrary to the object, and purpose, and spirit, of Article 33 as the Committee conceived it.

4. By their terms, the bulk of the provisions of the Convention do in fact apply only within the territory of the state parties. That is because the principal purpose of the Convention was to provide economic and social benefits for refugees in the country in which they are resettled. Article 33 is of a wholly different character. It is an exceptional provision designed for an exceptional humanitarian purpose. Those who drafted the Convention recognized that governments were not prepared to commit themselves to grant asylum, even to *bona fide* refugees. However, as an exceptional, humanitarian act, governments were asked to commit themselves not to prevent a person from escaping oppression and not to become an accomplice to their oppression. Article 33 provided that if a refugee had escaped or was escaping

oppression, other governments should not prevent the escape by returning the refugee into the hands of his (her) oppressors.

5. That was the purpose and purport of Article 33. There was no thought of distinguishing for that purpose between those who had already entered a state's territory and those who were merely knocking on its doors. Surely, we did not intend a provision that, while prohibiting a state from handing a refugee already in its territory over to his (her) oppressors, would permit a state to reach out beyond its borders to seize a refugee and return him to his oppressors.

6. When the Committee drafted Article 33 we had in mind primarily persons seeking refuge across land boundaries: there had been stories, and some evidence, that police of some countries had pushed refugees back into the hands of the pursuing Nazis. Article 33 was designed to prohibit such heartless behavior. The Committee did not consider the case of refugees coming by boat in particular, but the sentiments moving the draftsmen and their governments applied to them as well.

7. No one could anticipate how many refugees might claim the privilege of *non-refoulement*. Some delegates did express the concern that the right of *non-refoulement* should not become a vehicle for requiring the admission of massive numbers of migrants. But none of our discussions suggested any intent to condone a state's denying the right of *non-refoulement* to members of groups, without individually determining—through screening or other means—whether each individual qualified for refugee status. No government sought to reserve the right to reach out beyond its borders, seize potential refugees, and return them into the hands of their oppressors. By expressing a caveat about mass migrations, the delegates were confirming that the right of *non-refoulement* attached to individual refugees and not to groups. They were not limiting the territorial reach of Article 33.

8. When this point arose before the *Ad Hoc* Committee on Feb. 10, 1950, I expressed agreement that Article 33 imposed no requirement of admission to refugees, but cautioned:

> It did not, however, follow that the convention would not apply to persons fleeing from persecution who asked to enter the territory of the contracting parties. Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, . . . the problem was more or less the same. Whatever the case might be, . . . he must not be turned back to a country where his life or freedom could be threatened. No consideration of public order should be allowed to overrule that guarantee, for if the State concerned wished to get rid of the refugee at all costs, it could send him to another country or place him in an internment camp.
>
> Summary Record of the Twentieth Meeting of the *Ad Hoc* Committee on Statelessness and Related Problems held Feb. 1, 1950, U.N. Doc. E/AC.32/SR.20.

9. Mr. George Warren attended the Conference of Plenipotentiaries as the U.S. delegate at the July 11 and 25, 1951 sessions, but he and I had no disagreement regarding this point. My statement the previous year, cited in paragraph 8 *supra*, continued as the official position of the United States government with regard to the meaning of Article 33. Mr. Warren took no action to rescind that interpretation or to support any other interpretation.

10. In short, as I understood Article 33, and as I believe all members of the Committee understood Article 33, it amounted to this: a state would not be obliged to admit any refugee. But a state could not seize a refugee in its territory and hand him over to his oppressors. It may not—indeed, *a fortiori*—reach out beyond its borders, pick up a refugee off of the high seas and forcibly return him into the hands of his oppressors.

Respectfully submitted,

_____

Louis Henkin

Signed and sworn before me on
this 15th day of December, 1992.

_____

Notary Public
New York, N.Y.
December 15, 1992

Supreme Court, U.S.
FILED
JAN 21 1993
OFFICE OF THE CLERK

No. 92-344

In the Supreme Court of the United States

OCTOBER TERM, 1992

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-344

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Respondents have wholly failed to justify the extraordinary injunction ordered by the court of appeals that bars implementation of Executive Order No. 12,807, the President's response to a life-threatening migrant crisis on the high seas. If allowed to stand, that injunction would directly interfere with the operation of military vessels on the high seas under the direction of the President as the Commander-in-Chief, and upset the delicate balance of rapidly changing diplomatic and other measures undertaken by the President to restore democratic rule in Haiti. As we explain in our opening brief, judicial review of the President's policy is precluded, injunctive relief is foreclosed by principles of equity, and respondents' challenge under 8 U.S.C. 1253(h) is barred under principles of collateral estoppel by virtue of the Eleventh Circuit's decision in *Haitian Refugee Center, Inc.* v. *Baker*, 953 F.2d 1498, cert. denied, 112 S. Ct. 1245 (1992). But if the Court reaches the merits, respondents' claim under Section 1253(h) should be rejected, because that Section has no application to aliens who are outside the borders of the United States.

I. The respondents in this case—aliens who are outside the United States—have no basis for seeking an injunction from a U.S. court to prevent the President from implementing a policy of interdiction and repatriation of Haitian migrants on the high seas.[1] As we have demonstrated in our opening brief (at 13-18), that conclusion is compelled by "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 345 (1984).

Congress has expressly provided in the INA for judicial review of refugee and other matters involving aliens who are in the United States and subject to deportation or exclusion proceedings. 8 U.S.C. 1105a(a) and (b). By contrast, Congress has omitted any provision for judicial review of such matters at the behest of aliens outside the United States. The structure of the INA therefore impliedly forecloses APA review for those aliens. Indeed, as we have explained (Gov't Br. 15-17), when Congress enacted 8 U.S.C. 1105a(b) in 1961, it did so for the specific purpose of precluding APA suits to challenge exclusion decisions; it instead limited aliens who are at the border seeking admission to the United States to whatever review may be available in habeas corpus. It follows *a fortiori* that the respondents in this case—who have "never presented [themselves] at the borders," *Brownell* v. *Tom We Shung*, 352 U.S. 180, n.3 (1956)—cannot invoke the APA to challenge Executive actions under the immigration laws.[2] And because such aliens are not eligible for habeas corpus relief, *Johnson* v. *Eisentrager*, 339 U.S. 763, 771, 777-781, 790-791 (1950); compare *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269, 271, 273-275 (1990), judicial review is altogether barred.[3]

[1] Contrary to respondents' suggestion (Br. 52 n.94), the preclusion of review applies to all their claims.

[2] Respondents err in contending (Br. 55) that when Congress enacted 8 U.S.C. 1105a in 1961, it merely "channeled judicial review of individual deportation and exclusion orders into particular modes." Congress foreclosed *all* APA review in the exclusion process because "[t]he sovereign United States cannot give recognition to a fallacious doctrine that an alien has a 'right' to enter this country which he may litigate in the courts of the United States against the U.S. Government as a defendant." H.R. Rep. No. 1086, 87th Cong., 1st Sess. 33 (1961).

Respondents nevertheless contend that review is not precluded here because implementation of Executive Order No. 12,807 involves "governmental conduct towards aliens that arises wholly outside the deportation or exclusion process." Resp. Br. 53. This argument stands the statutory scheme on its head. Judicial review is an ordinary culmination of the adjudicatory processes of deportation and exclusion, which are conducted within the United States and within the usual purview of our courts. Respondents' suit is precluded because it does not arise in that setting, but instead seeks to halt an interdiction and repatriation program on the high seas, where any judicial role would be extraordinary. Nor are respondents helped by stressing (Br. 55) that they "sue here not to gain entry, but to prevent their forced return to Haiti"; that fact further attenuates respondents' personal nexus to this country and

[3] Respondents assert (Br. 50) that "[p]articularly in the immigration context, courts have permitted aliens located outside of the United States to obtain review of the legality of U.S. government actions adversely affecting them." The cases they cite for that proposition, however, offer no support for this suit. See Resp. Br. 50 n.88. In *Mendez* v. *INS*, 563 F.2d 956 (9th Cir. 1977), and *Juarez* v. *INS*, 732 F.2d 58 (6th Cir. 1984), the courts simply allowed aliens who were once in the United States and who had been the subject of deportation proceedings to continue to challenge their deportations even though they had been deported while their cases were pending. In *Silva* v. *Bell*, 605 F.2d 978 (7th Cir. 1979), the court allowed a class of visa applicants, including aliens residing abroad, to challenge an INS policy. However, the decision rested on the fact that the class also included aliens residing in the United States, and the government conceded, for purposes of the case, that it would accord the same treatment to non-resident class members as it accorded to residents. *Id.* at 984. This Court's decisions in *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991), and *Jean* v. *Nelson*, 472 U.S. 846 (1985), also cited by respondents (Br. 51 n.92, 52 & n.93, 53 n.95, 56), involved aliens in the United States. Still other decisions cited by respondents (Br. 50 n.87) did not involve immigration issues at all.

its laws, and thereby renders their invocation of the injunctive powers of U.S. courts all the more inappropriate.

Finally, the breadth and discretionary nature of the statutory authority invoked by the President in this case—which permits the President to restrict entry of any aliens or class of aliens "[w]henever the President finds" that their entry "would be detrimental to the interests of the United States," 8 U.S.C. 1182(f)—confirm that the INA contemplates no role for the courts here. See *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2775-2776 (1992); *Webster* v. *Doe*, 486 U.S. 592, 600 (1988); Gov't Br. 17-18. Respondents denigrate these considerations as ones of "mere[] executive convenience" (Br. 55), but they are far more than that. The close connection between the interdiction program and the larger effort to resolve the international crisis concerning Haiti vividly illustrates how judicial interference with the President's ability to speak with one voice in foreign affairs can seriously prejudice the national interest. At the very least, if judicial review is not altogether precluded by the INA, established equitable principles bar injunctive relief and require dismissal of this suit without reaching the merits. See Gov't Br. 55-57.

II. Adjudication of respondents' claim under 8 U.S.C. 1253(h) also is barred by principles of collateral estoppel by virtue of the Eleventh Circuit's decision in *HRC* v. *Baker*, which rejected a claim under Section 1253(h) in a suit brought on behalf of a class of plaintiffs that includes the Haitian plaintiffs in this case.

A. We have shown (Gov't Br. 18-27) that the Second Circuit erred in declining to apply collateral estoppel on the grounds that the plaintiffs in this case are different from those in *HRC* because they challenge a different "Interdiction Program," and that the May 1992 Executive Order constituted "an intervening change in the applicable legal context," Pet. App. 12a. Respondents do not defend the latter rationale (see Resp. Br. 47), and we have already answered their brief attempt to defend the former (see Resp. Br. 43-44). See Gov't Br. 19-21.

The interdiction program has remained in effect and unchanged since 1981. The 1992 Executive Order merely revised the procedures to be followed *after* an alien is interdicted, and therefore did not alter the identity of the class that challenged the adequacy of those procedures both before and after the Order was issued.

B. Respondents, however, make a further argument to avoid collateral estoppel. They contend that the class certified in *HRC* was limited to screened-out migrants; that the class certified by the district court in the present case is composed of migrants who were initially screened in under the screening policy in effect prior to May 24, 1992; and that the lack of identity between the two classes renders collateral estoppel inapplicable. See Resp. Br. 41-42. That argument is wholly without merit.

Respondents are incorrect in asserting (Br. 3) that "[t]he *HRC* class included only screened-out Haitians, i.e., persons who had been harmed by alleged inadequacies in the initial screening procedures." In fact, the *HRC* class was composed of

> *all* Haitian aliens who are currently detained *or who in the future will be detained* on U.S. Coast Guard Cutters or at Guantanamo Naval Base who were interdicted on the high seas pursuant to the United States Interdiction Program and who are being denied First Amendment and procedural rights.

Pet. App. 46a (emphasis added). Thus, the class action in *HRC* was intended to gain relief for individuals who remained in Haiti at the time the suit was filed, but who might, in the future, leave that country by boat and be interdicted by U.S. officials.

At the outset of the instant case, respondents' principal challenge was to the policy, announced by INS on February 29, 1992, of requiring those screened-in Haitians at the Guantanamo Bay Naval Base who were found to be medically excludable to undergo second interviews at Guantanamo. See Pet. 6 n.3. It was in this context that the district court certified a class of screened-in plaintiffs.

Respondents now present, on behalf of the *same* class of screened-in Haitians, a challenge to the intervening May 1992 Executive Order. The great majority of previously screened-in migrants were unaffected by the new Order, since the government continued to procees Haitians interdicted prior to May 24 under the procedures in effect prior to that date. There are, however, three small groups of Haitians who were initially screened in but have since been repatriated. These include (1) medically excludable Haitians who were initially screened in but then subsequently found, following a second interview at Guantanamo, not to qualify for refugee status; (2) screened-in medically excludable Haitians who were repatriated after they refused to participate in their second interviews; and (3) screened-in migrants who were inadvertently returned to Haiti due to U.S. officials' mistaken belief that they had been screened out. Respondents' theory appears to be that at least some of these individuals are adversely affected by the May 1992 Executive Order because they intend to take to the seas again and expect to be repatriated without an interview, or are now deterred from doing so by the current policy of direct repatriation.

The problem with respondents' argument is that neither the injury they allege nor the illegality they assert has any connection to the prior screening. Their claim rests instead upon the prospect of *future* interdiction and repatriation: like the *HRC* plaintiffs, the gravamen of respondents' claim is that they wish to leave Haiti by boat but fear repatriation. Insofar as their challenge to the May 1992 Executive Order is concerned, the respondent Haitians therefore fall squarely within the class certified in *HRC*.[4]

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[4] Nor is there any basis for respondents' contention (Br. 43) that their interests "were not adequately represented by the screened-out named plaintiffs in *HRC*." The *HRC* plaintiffs invoked 8 U.S.C. 1253(h) in their challenge to the refugee determination procedures then in place. The *HRC* plaintiffs' statutory claim depended upon the proposition that Section 1253(h) forbids repatriation of refugees encountered on the high seas, and they forcefully advocated that position.

Respondents also argue (Br. 47 n.86) that "the Eleventh Circuit may reasonably have determined that [Section 1253(h)] was not directly implicated by petitioners' conduct [since] even if petitioners made some mistakes in screening, they were bringing to the U.S. anyone who demonstrated a 'credible' fear of persecution." Of course, the Eleventh Circuit *could* have decided *HRC* by holding that the screening procedures then in place were sufficient to fulfill whatever duties Section 1253(h) might impose. The court did not decide the case on that ground, however: it held instead that Section 1253(h) does not apply at all to aliens who are not "in the United States." Pet. App. 214a-216a; see Pet. App. 52a-61a (Walker, J., dissenting). In deciding whether the change effected by the May 24 Executive Order is "material" for purposes of collateral estoppel, this Court must focus on the reasoning *actually employed* by the Eleventh Circuit—not on whether there exists a hypothetical mode of analysis under which the presence or absence of screening procedures would take on dispositive significance. Compare *Montana* v. *United States*, 440 U.S. 147, 158-162 (1979).

Thus, even those respondents who were actually screened in under the old Executive Order, and were subsequently returned to Haiti, cannot escape the preclusive effect of *HRC*. Respondents compound their error, however, by arguing that the class of screened-in plaintiffs certified by the district court here includes individuals who have never been screened, but who allegedly *would have been* screened in if the May 1992 Executive Order had not been issued. See Resp. Br. 42 & n.78. Under this reasoning, of course, the plaintiffs in *HRC* would also qualify as screened-in migrants, since the gravamen of their complaint was that they would have been screened in if more accurate procedures had been used. Respondents' effort to bring all *potential* "screen-ins" within the certified class in this case only underscores the futility of their attempt to assert a sharp dichotomy between screened-in and screened-out migrants, and thus to distinguish themselves from the class certified in *HRC*.

C. Finally, respondents contend that the Second Circuit correctly declined to apply collateral estoppel in order to permit the "percolation" of the pertinent legal issues

through "multiple courts of appeals." Resp. Br. 46. The very purpose of issue preclusion, however, is to protect litigants "from the expense and vexation attending multiple lawsuits, conserve[] judicial resources, and foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 153-154. To suggest that the possibility of duplicative litigation and circuit conflict weighs *against* the application of collateral estoppel stands preclusion doctrine on its head. Respondents' reliance on *United States* v. *Mendoza*, 464 U.S. 154 (1984) (see Resp. Br. 46), is particularly misplaced. *Mendoza* rested on concerns unique to the United States government as litigator, see 464 U.S. at 159-163; and, in any event, even the United States is subject to *mutual* collateral estoppel. See *United States* v. *Stauffer Chemical Co.*, 464 U.S. 165, 173 (1984).[5]

[5] Respondents urge that the Second Circuit's decision not to apply collateral estoppel should be reviewed deferentially; they rely on this Court's decision in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 331 (1979), for the proposition that "[c]ourts have 'broad discretion' to deny application of collateral estoppel." Resp. Br. 45. *Parklane Hosiery* stated only that federal *trial courts* possess broad discretion to determine whether *offensive* collateral estoppel should be applied. 439 U.S. at 331. It did not address the situation in which collateral estoppel is used *defensively*—the thrust of the Court's opinion was that the offensive use of collateral estoppel raises distinct concerns that make a case-specific analysis particularly appropriate—or suggest that *this* Court owes deference to the decision of a federal court of appeals. Since *Parklane Hosiery*, this Court has frequently resolved issues regarding the defensive use of collateral estoppel without suggesting that a deferential standard of review was required. See, *e.g.*, *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867, 880-882 (1984); *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 362-363 (1984); *United States* v. *Stauffer Chemical Co.*, 464 U.S. at 169-174; *Montana* v. *United States*, 440 U.S. at 153-164. Respondents do not argue in this Court, and did not argue below, that the *district court's* disposition of the collateral estoppel issue should be reviewed under an abuse-of-discretion standard. Their reluctance is understandable, since the pertinent district court opinion (which held for the government on the merits) did not address the government's contention that respondents' challenge to the May 24 Executive Order is barred by collateral estoppel. See Pet. App. 165a-168a.

III. Even if respondents were able to overcome the formidable threshold obstacles to this suit, the complaint still must be dismissed because their claim fails on the merits: 8 U.S.C. 1253(h) simply was never intended to apply to aliens outside the United States, and Article 33 of the U.N. Convention cannot be invoked to extend its territorial scope.

A. *Section 1253(h).* As we have explained in our opening brief (at 27), Section 1253(h) must be construed in light of the "longstanding principle of American law" that an Act of Congress is presumed "to apply only within the territorial jurisdiction of the United States" unless there is a "clearly expressed," "affirmative intention" by Congress to the contrary. *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991) (citations omitted). Respondents contend (Br. 33-36) that the presumption is inapplicable here because it operates only where Congress's intent is "unexpressed," while here Congress's intent is supposedly "unambiguous"; because the presumption should be inapplicable to the high seas; and because the INA is inherently international in scope. All of these points are insubstantial. Congress nowhere manifested any specific intent to apply Section 1253(h) extraterritorially; the Court has already held that the presumption applies on the high seas as well as in foreign countries (see *Arabian American Oil*, 111 S. Ct. at 1235; *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989)); and the general subjects to which the relevant parts of the INA are addressed (the admission of aliens into and the deportation and exclusion of aliens from the United States) in no way suggest that the INA was intended to regulate encounters between aliens and U.S. military and civilian operations outside our borders.

In addition, the usual presumption against extraterritorial application of an Act of Congress is strongly reinforced here by the principles that statutes not be construed to interfere with (a) the conduct of foreign policy (the delicate diplomatic endeavors to resolve the multifaceted international crisis concerning Haiti); (b) the

constitutional and statutory responsibilities of the President (his discretionary authority under other provisions of the INA itself, 8 U.S.C. 1182(f) and 1185(a)(1), to suspend entry of Haitian migrants, and his directives as Commander-in-Chief to Coast Guard vessels to guard the Nation's borders through the policy of interdiction and repatriation);[6] or (c) a fundamental attribute of the Nation's sovereignty (the power to exclude aliens). See Gov't Br. 27-28. In this case, respondents have pointed to no "clear statement" in either the text or legislative history of Section 1253(h) of the sort that would be necessary to overcome the presumption against extraterritoriality, even if it were not reinforced here by these other considerations. *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2170 (1991).

1. *Statutory Text and Structure.* a. Neither the text of Section 1253(h) nor the structure of the INA suggests the world-wide scope respondents urge for that Section. Paragraph (1) of Section 1253(h) provides:

> The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. 1253(h)(1) (Supp. II 1990). This language speaks only to the Attorney General, who ordinarily has custody of aliens—and therefore is in a position to "deport" or "return" them—only if the aliens are physically present in the United States. See 8 U.S.C. 1182(d)(5), 1222, 1225(b), 1252(a); *INS* v. *National Center for Immigrants' Rights*, 112 S. Ct. 551 (1991).

[6] Respondents' suggestion (Br. 37 n.69) that the injunction below does not intrude upon the President's Commander-in-Chief powers because the Coast Guard has been placed in the Department of Transportation is frivolous. Under 14 U.S.C. 1, the Coast Guard "shall be a military service and a branch of the armed forces of the United States at all times."

There is, by contrast, no mention of the Coast Guard or any other agency that might encounter aliens beyond our borders. Thus, respondents' contention (Br. 13, 33) that Section 1253(h) "unambiguously" applies to the interdiction and repatriation program conducted by the Coast Guard on the high seas is answered by the Section's first three words. Moreover, the prohibition in Section 1253(h) is triggered only "if the Attorney General determines" that the alien would be threatened with persecution. The Attorney General of course is required to make such a determination regarding an alien who is within the United States, because the alien cannot be removed from the country (by deportation or exclusion) without first having an opportunity for a hearing before the Attorney General. See 8 U.S.C. 1226, 1252. But the INA does not require the Attorney General to make such a determination regarding each of the countless aliens who might be encountered each year by the thousands of other U.S. personnel stationed beyond our borders. See Gov't Br. 30-32. For these reasons, the most natural reading of paragraph (1) of Section 1253(h), even when read in isolation, is that it prohibits the Attorney General from deporting or returning an alien *from* the United States (where he has responsibility for aliens) "*to* a country" in which the alien would be threatened with persecution.

This interpretation is reinforced by the exceptions in paragraph (2) of Section 1253(h), which contain the Section's only "geographic reference[s]," *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2150 (1992) (Stevens, J., concurring in the judgment). All four references are to the "United States," giving it a decidedly domestic focus.

b. Respondents' attempts to shift this focus abroad are unavailing. They first invoke (Br. 12) the Second Circuit's reliance on paragraph (1)'s reference to "any alien." See Pet. App. 16a, 17a, 21a, 22a. As we have explained (Gov't Br. 32), however, such general language is wholly insufficient to overcome the presumption against extraterritoriality. See *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 282, 287-288 (1949); *Defenders of Wildlife*,

112 S. Ct. at 2150 n.4 (Stevens, J., concurring in the judgment). In Section 1253(h), "any alien" means any alien *in the United States* who is subject to deportation or exclusion proceedings, and who therefore is subject to being "deport[ed] or return[ed]" by the Attorney General to another country.

Respondents stress (Br. 13) that "Congress specified that the Attorney General may not return—i.e., send back—an alien '*to* a country' where she would face persecution, without specifying where an alien may not be returned *from*—*i.e.*, within or without the United States." If respondents are correct on the latter point, then their claim under Section 1253(h) must fail for that reason alone, since only an express statement affirmatively imposing obligations and conferring rights outside the United States would suffice to extend Section 1253(h)'s coverage beyond our borders. But in addition, as explained above, the text of Section 1253(h) in fact contains numerous affirmative indicia that it applies only to actions the Attorney General takes with respect to aliens who are physically present within the United States.[7]

Although respondents concede that the exceptions in paragraph (2) of Section 1253(h) "do contain genuine limits" by virtue of their repeated references to the "United States," they insist that paragraph (1) is not so limited because it does not expressly refer to the "United States." See Resp. Br. 19. Respondents ignore the fact that paragraphs (1) and (2) are part of a

[7] Respondents rely (Br. 13 n.17) on the provision in 14 U.S.C. 89(b) that "officers of the Coast Guard insofar as they are engaged * * * in enforcing any law of the United States shall * * * be deemed to be acting as agents of the particular executive department * * * charged with the administration of the particular law" and "be subject to all rules and regulations promulgated by such department * * * with respect to the enforcement of that law." In this case, however, the Coast Guard is acting pursuant to authority delegated directly to it by the President pursuant to 8 U.S.C. 1182(f) and 1185(a)(1); the Coast Guard is not acting as the agent of the Attorney General. See Exec. Order No. 12,807, § 2 (J.A. 377-378). In any event, 14 U.S.C. 89(b) cannot extend Section 1253(h) to locations where it would otherwise not apply.

single Section that both states a general prohibition and carves out exceptions to that prohibition. The significance of the express geographical references in the exceptions is that they *presuppose* that the alien who would otherwise benefit from paragraph (1) has already "arriv[ed] * * * in the United States." 8 U.S.C. 1253(h)(2)(C). It is only such aliens who the Attorney General would "deport or return" to another country.

c. The domestic focus of Section 1253(h) is further confirmed by the statutory context in which it appears—specifically, as part of 8 U.S.C. 1251-1253, which prescribe the standards and procedures for deporting aliens who are "in the United States." 8 U.S.C. 1251(a) (Supp. II 1990), 1253(a); see Gov't Br. 35-36. Respondents concede (Br. 18) that "Congress originally placed [Section 1253(h)] in Part V of the INA" because at the time "it governed *only* withholding of deportation, and thus applied only to those aliens located within the United States who were subject to deportation." In respondents' view, however, after Congress amended Section 1253(h) in 1980, "this location was a historical relic of no significance." "Indeed," respondents continue, "if [Section 1253(h)'s] location in Part V were meaningful, its applicability would be limited solely to deportation proceedings and could not act, as it undeniably does, to protect aliens in exclusion proceedings under Part IV." See Resp. Br. 18.

As we explain below, however, the textual changes made by the 1980 amendments did no more than make relief under Section 1253(h) available to aliens in exclusion as well as deportation proceedings. Although Congress might have accomplished the same result by both amending Section 1253(h) and adding a new provision to Part IV of the INA (which prescribes procedures for exclusion proceedings), it reasonably chose to ensure uniformity as between exclusion and deportation proceedings in a more simplified manner by addressing both in a single amendment to the existing Section 1253(h). There was nothing anomalous or incompatible about that approach. Aliens in exclusion proceedings share certain

essential characteristics with those who are in deportation proceedings governed by Part V of the INA: both are physically present in the United States, and both are the subject of formal proceedings through which the Attorney General proposes to remove them from the United States. Those characteristics are necessarily associated with the location of Section 1253(h) in Part V of the INA. By contrast, respondents and other aliens outside the United States possess neither of those characteristics, and it accordingly would have been anomalous and incompatible with the structure of the INA to afford them relief under provisions of the Act that address the removal of aliens from within the United States. Contrary to respondents' contention, then, the location of Section 1253(h) continues to be quite "meaningful" and is not an "historical relic."

2. *Statutory History.* Because they are unable to find any specific support for their position in the text and structure of the INA, respondents rest their argument almost entirely on a comparison of the language of Section 1253(h) before and after it was amended by the Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 107. See Resp. Br. 11-12, 18-19, 23-25. Significantly, however, they do not cite a shred of evidence to support the proposition that Congress actually intended the 1980 amendments to have the effect of rendering Section 1253(h) world-wide in its scope.

In *Leng May Ma* v. *Barber*, 357 U.S. 185 (1958), this Court held that the relief of withholding of deportation under Section 1253(h) was not available to an alien who had been apprehended at the border and paroled into the United States, and who was therefore subject to exclusion rather than deportation proceedings. The Court concluded that such aliens were not "within the United States" in the "technical sense" in which that phrase was used in the version of Section 1253(h) then in effect. *INS* v. *Stanisic*, 395 U.S. 62, 71 (1969); see *Leng May Ma*, 357 U.S. at 188, 190; see also *INS* v. *Stevic*, 467 U.S. 407, 415 (1984). The Court also explained in *Leng May Ma* that our immigration laws have long distinguished between those aliens who have come to our shores seeking

admission and those who have entered and are within the United States. That distinction, the Court explained, was "carefully preserved" in the INA, which subjects the former to "exclusion proceedings" under Part IV of the Act, 8 U.S.C. 1221-1230, and subjects the latter to what the Court termed "expulsion" proceedings (commonly referred to as "deportation proceedings") under Part V, 8 U.S.C. 1251-1260. 357 U.S. at 187. The Court observed in this regard that although the word "deportation" also is used in Part IV "to refer to the *return* of excluded aliens from the country," "its use there reflects none of the technical gloss accompanying its use as a word of art in [Part V]." *Ibid.* (emphasis added). Thus, the Court held, Section 1253(h)'s provision for withholding of "deportation" did not permit withholding of the return of an alien in exclusion proceedings. See 357 U.S. at 189-190.[8] In light of *Leng May Ma*, the obvious import of Congress's amendment of Section 1253(h) in 1980 to delete "within the United States" and add "return" was to extend eligibility for "withholding" relief to aliens in exclusion as well as deportation proceedings.

Respondents' only reply is that *Leng May Ma* itself is not mentioned in the legislative history. See Resp. Br. 24-25. The failure to mention *Leng May Ma* by name is irrelevant, however, because the legislative history shows that Congress's purpose was to eliminate the very distinction between deportation and exclusion proceedings that was recognized in *Leng May Ma*. The House Report states that the amendments revise Section 1253(h), "relating to withholding of deportation, to require (with some exceptions) the Attorney General to withhold deportation of aliens who qualify as refugees and who are in exclusion[,] as well as deportation, proceedings." H.R. Rep. No. 608, 96th Cong., 1st Sess. 30 (1979). The Senate

[8] *Leng May Ma* itself therefore forecloses respondents' argument that "return" in Section 1253(h) necessarily refers to aliens outside the United States because "deport" in that Section encompasses excluded aliens by virtue of the use of "deport" in Part IV of the INA in connection with exclusion proceedings. See Resp. Br. 19 (citing 8 U.S.C. 1225(c), 1227(a)(1)).

Report makes the same point in virtually identical language. S. Rep. No. 256, 96th Cong., 1st Sess. 17 (1979). And the revisions were explained in the same way by the Commissioner of INS when they were proposed in 1977,[9] and again in 1979 by witnesses for Amnesty International, U.S.A., who characterized them as only "modest" changes.[10] There is, by contrast, absolutely no support in the legislative history for respondents' notion that the 1980 amendments were intended to have the far from "modest" effect of imposing duties on United States officials—and corresponding rights on aliens—throughout the world.

Respondents note (Br. 25 n.42) that the bills to which the Commissioner of INS and Amnesty International addressed their remarks would have continued to make withholding of deportation discretionary with the Attorney General, while the bill ultimately enacted made withholding mandatory so as to conform fully with Article 33. This attempt to explain away the testimony is completely unavailing. Although the versions of Section 1253(h) under consideration at the time of the testimony differed in certain respects from that finally enacted, they contained the particular revisions on which respondents rest their entire case—namely, the deletion of "within the United States" and the addition of "return." See H.R. 3056, 95th Cong., 1st Sess. § 5(e) (*1977 Hearings* at 12); H.R. 2816, 96th Cong., 1st Sess.

[9] See *Admission of Refugees into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 81, 83, 84, 94 (1977) [*1977 Hearings*].

[10] See *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 169 (1979) [*1979 Hearings*]. Although Amnesty International, U.S.A. has filed an amicus brief in support of respondents in this Court, it makes no mention of—and thus apparently has no plausible argument for why the Court should ignore—its contrary interpretation of the relevant statutory text when Section 1253(h) was amended.

§ 203(e) (*1979 Hearings* at 14-15).[11] Moreover, the Conference Report approved by Congress at the conclusion of the legislative process, like the House and Senate Reports, refers to Section 1253(h) as providing for withholding of "deportation"[12]—a description totally at odds with respondents' notion that Section 1253(h) applies to aliens who are beyond our borders and therefore beyond the reach of both deportation *and* exclusion proceedings.[13]

[11] Respondents fault us for not "offer[ing] any explanation why it took Congress twenty-two years to repair the statute to 'correct' *Leng May Ma*, or why Congress did not simply substitute other limiting language for 'within the United States' rather than removing the geographic limit altogether." Resp. Br. 25. Respondents presumably do not mean to argue that the result in *Leng May Ma* was somehow "corrected" *prior* to the 1980 amendments, since that decision was followed during the intervening years (see Pet. Br. 52 n.41; note 13, *infra*) and Congress did not revise the statutory language on which the Court relied in *Leng May Ma* until 1980. Respondents' argument must instead be that the 1980 amendments both "corrected" *Leng May Ma*'s holding *and* extended Section 1253(h) far beyond exclusion proceedings to encompass any encounter by U.S. officials with refugees anywhere in the world. The fact that the legislative history specifically discusses the former but makes no mention of the latter cuts strongly against respondents' contention that the 1980 amendments were intended to have the latter, quite startling result. The fact that Congress did not act for 22 years indicates that Congress saw no inconsistency between Section 1253(h) as it then stood and the international obligations the United States assumed when it acceded to Article 33 in 1968. And the fact that Congress might have chosen other language to accomplish the same result scarcely undermines our interpretation of the amendments it did enact.

[12] See H.R. Conf. Rep. No. 781, 96th Cong., 2d Sess. 20 (1980); H.R. Rep. No. 608, *supra*, at 17-18, 30; S. Rep. No. 256, *supra*, at 17.

[13] Although amici Members of Congress offer an extensive discussion of the legislative history of the Refugee Act of 1980, they likewise identify nothing that either rebuts our submission concerning the effect of the amendments to Section 1253(h) or supports respondents' submission that Section 1253(h), as amended, now is world-wide in scope. See Amici Br. 11-14, 25-30 (discussing Section 1253(h)). The excerpts they cite that directly pertain to Section 1253(h) for the most part refer to it as providing for withholding of "deportation," which does not include repatriation

B. *Article 33.* In an effort to buttress their position that Section 1253(h) should be given extraterritorial effect, respondents fall back on Article 33 of the U.N. Convention. See Resp. Br. 13-16, 19-23, 25-30. Article 33, like Section 1253(h), however, does not impose obligations on a Contracting State with respect to aliens outside its own territory.[14]

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of aliens who are already outside the United States. See Amici Br. 11-12 & nn.21, 22 (citing H.R. Conf. Rep. No. 781, *supra*, at 20; H.R. Rep. No. 608, *supra*, at 18; 126 Cong. Rec. 4500 (1980) (Rep. Holtzman); 125 Cong. Rec. 35,814-35,815 (1979) (Rep. Holtzman)). The remainder of the amici brief has no bearing on the interpretation of Section 1253(h). See Amici Br. 14-24 (discussing 8 U.S.C. 1157 (refugee admissions) and 1158 (asylum)).

Although amici Members of Congress assert (Br. 25-27), without support, that the legislative history does not support our submission that Congress amended Section 1253(h) in 1980 only to extend withholding of deportation relief to exclusion proceedings, one of the authors of their brief agreed with our position in an article that amici repeatedly cite. See D. Anker & M. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 40 & n.144 (1981) (discussing *Leng May Ma* and describing revision of Section 1253(h) to extend it to exclusion proceedings as an "obvious response" to more recent litigation challenging the continued unavailability of Section 1253(h) and asylum procedures in exclusion cases, citing *Matter of Pierre*, 14 I. & N. Dec. 467 (1973), aff'd, 547 F.2d 1281 (5th Cir.), vacated on other grounds, 434 U.S. 962 (1977)). See also 19 San Diego L. Rev. at 45 (quoting amended language and stating: "Thus, the protections of this section were extended to apply in exclusion as well as deportation proceedings"). That likewise was the contemporaneous construction of the amendments by other commentators and by INS itself. See Gov't Br. 53-54 n.43.

[14] Respondents go so far as to argue (Br. 36-39) that Section 1253(h) should be construed in the manner they urge so as not to "violate" international law, as embodied in Article 33. As we explain in our opening brief and below, our construction is fully consistent with Article 33, which likewise does not apply outside the territory of the Contracting State. But even if our understanding of the geographical scope of Article 33 were wrong, it would not follow that Section 1253(h) must also apply outside the United States. Section 1253(h) is designed to embody the principle of Article 33 in our *domestic* immigration laws, insofar as those laws establish procedures for adjudicating claims of aliens who have

1. *Text of the Convention.* Respondents' contention (Br. 13-16) that their interpretation is compelled by the text of Article 33 is without merit. Paragraph 1 of Article 33 provides that "[n]o Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened" on account of, *inter alia*, his political opinion. J.A. 400. As they do with respect to Section 1253(h), respondents characterize this language as sweeping and all-inclusive, and therefore as applicable even to refugees outside the territory of the Contracting State. But nothing in Article 33 specifically so provides. Rather, like Section 1253(h), Article 33 only prohibits removal of a refugee *from* the territory of the Contracting State *to* a foreign territory where he would be threatened with persecution. This territorial premise is made explicit in paragraph 2 of Article 33, which states that the benefit of Article 33 may not be claimed by a refugee who is a danger to the security of "the country in which he is." J.A. 400. That phrase—the only territorial reference in Article 33—presupposes that the refugee who would otherwise benefit from paragraph 1 is already "in" a "country" of refuge.

In arguing that Article 33 nevertheless imposes obligations on a Contracting State throughout the world, respondents rely almost exclusively on the inclusion of the French word "refouler" in paragraph 1. Respondents assert (Br. 14) that the ordinary meaning of "refouler" is "return," and they note that the word is defined in *Dictionnaire Larousse (Francais, Anglais)* 631 (1981) as "to stem," "to repulse," or "[t]o drive back." At the

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arrived in our territory and are subject to deportation or exclusion from the United States. Even if Article 33 applies to aliens beyond our borders, it would in no sense "violate" international law if Section 1253(h) were nonetheless limited to the deportation and exclusion context in which it was intended to apply. The result would be that other U.S. officials would be left to conform their conduct to Article 33 on the high seas and elsewhere outside the United States to the extent that other relevant statutes allowed them to do so. Compare *Stevic*, 467 U.S. at 429 n.22.

same time, respondents take issue (Br. 15) with the definition of "refouler" cited in our opening brief: "to expel (aliens)." See Gov't Br. 39 (quoting *Cassell's French Dictionary* 627 (1978)). Respondents do not dispute that the meaning we proffer (unlike the general definition on which they rely) is specifically relevant to the subject matter of this case and connotes the ejection of an alien from within the country's borders. But they reject our interpretation out of a belief that it would render the term "return ('refouler')" redundant by in effect causing Article 33.1 to forbid a Contracting State to "expel or expel" an alien. See Resp. Br. 15. Respondents are wrong for numerous reasons.

As the court of appeals pointed out, "expulsion" in this context typically connotes the "formal process whereby a lawfully resident alien may be required to leave a state, or be forcibly ejected therefrom." Pet. App. 29a (quoting G. Goodwin-Gill, *The Refugee in International Law* 69 (1983)). The Convention itself uses the term in that special sense in Article 32.1, which provides that "[t]he Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order." J.A. 399. Read in this way, "expel" does not reach all classes of aliens present in a country. Accordingly, the term following "expel" in Article 33.1—"return ('refouler')"—rounds out the prohibition by ensuring that aliens whose presence in the country is unlawful are covered. The phrase "in any manner whatsoever" makes clear that the prohibition applies regardless of the means used to remove refugees from a country (*e.g.*, summary reconduction to the border, as distinguished from the formal process of expulsion). It follows that there is no redundancy if, as we submit, "return ('refouler')" shares with "expel" the more general connotation of ejecting an alien from the country. The court of appeals in fact agreed that these two terms have different meanings in this setting. See Pet. App. 29a.[15]

[15] By contrast, as the court of appeals also acknowledged (Pet. App. 29a), respondents' contention that the word "return" in Article 33 comprehensively encompasses the repatriation of any refugee anywhere in the world to a country where he would be threatened with persecution *would* render superfluous the prohibition against "expelling" an alien to such a country, since that method of repatriation would be subsumed in the all-encompassing prohibition against "return."

Indeed, respondents ignore a substantial body of authority for the proposition that the words "refouler" and "refoulement" have meanings other than "repulse" or "drive back" in this setting—meanings that directly support our interpretation of Article 33.1 and that refute respondents' submission that the text of that Article unambiguously gives it extraterritorial application. Thus, in a legal context, "refouler" means "expelling an undesirable foreigner," T. Quemner, *Dictionnaire juridique: Francais-Anglais* 214 (1974), and "refoulement" means "the return of a person who has entered a country illegally to the border; a less formal procedure than expulsion or deportation." J. Fox, *Dictionary of International & Comparative Law* 372 (1992). The latter work cites a French judicial decision that was contemporaneous to the drafting of the U.N. Convention, *In re Woudstra*, 18 I.L.R. 301 (Ct. App. of Amiens 1951). There, the court noted that a card issued to the alien certifying that he had applied for a residency permit was withdrawn and that "he was invited, by a prefectoral decree of '*refoulement*', to leave the country." 18 I.L.R. 301. The alien subsequently reentered France and was charged under a criminal statute applicable to aliens "who had been expelled," but the court held that he must be acquitted, observing, *inter alia*, that "[a] decree of '*refoulement*' is not the same thing as an expulsion decree." *Ibid.*[16] The same distinction is made

[16] The French Conseil d'Etat, the country's highest administrative court, has often considered challenges by foreigners to orders of refoulement which require them to leave French territory. See, *e.g.*, *M. Teixeira (Antonio)*, No. 12.697 (Conseil d'Etat Oct. 12, 1979); *M. Likound*, No. 12.049 (Conseil d'Etat July 27, 1979); *M. Okeke (Josephat)*, No. 14.184 (Conseil d'Etat June 1, 1979); see also *Ministre de l'Interieur c/ M. Benini*, No. 16.562 (Conseil d'Etat Oct. 3, 1979) (rejecting request by the Minister of the Interior to

in French treatises. See H. Batiffol, *Traité Elémentaire de Droit International Privé* § 166 (3d ed. 1959); N. Guimezanes, *Le droit des éstrangers: l'entrée et le séjour* 107 (1987).

Finally, respondents' interpretation of "refouler" in Article 33.1 to mean "repel" or "drive back" would have the consequence of prohibiting a Contracting State from turning back from its borders a massive movement of aliens claiming to be refugees, where to do so would leave them in the hands of the persecuting State. The only alternative would be for the Contracting State to admit the aliens into its territory. That result would be flatly inconsistent with the decision by the drafters of the Convention *not* to impose an obligation on a Contracting State to grant asylum or to tolerate a massive influx of refugees. See pages 23-25, *infra; INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 441 (1987). Respondents concede (Br. 26) that Article 33 does not compel a Contracting State to admit refugees, but they do not explain how that concession can be squared with their interpretation of the Article (based on a general French definition of "refoulement") that would bar a Contracting State from repelling refugees if it borders on the State of persecution.

2. *Negotiating History.* Any remaining doubt about the scope of Article 33 is dispelled by its background and negotiating history. Significantly, a report published by the United Nations in 1949 in anticipation of drafting the Convention used "expulsion" to mean "the juridical decision taken by the judicial or administrative authorities whereby an individual is ordered to leave the territory of the country"; at the same time it used "reconduction" (which it regarded as the equivalent of "refoulement") to mean "the mere physical act of ejecting from the national territory a person who has gained entry or is residing therein," but *not* "to signify the act of preventing a foreigner who has presented himself at the frontier from

annul the decision of a lower tribunal blocking the refoulement of a resident foreigner). (Conseil d'Etat decisions are available on Lexis, International Law Library, FRPBCS file.)

entering the national territory." U.N. Dep't of Social Affairs, *A Study of Statelessness* 60 & n.1 (1949); see Gov't Br. 43-44 n.31. This usage parallels that in the French authorities discussed above and supplies a firm grounding in the genesis of Article 33 for construing its text in the manner we urge.

The same understanding is reflected in the discussions of the Conference of Plenipotentiaries who finalized and adopted Article 33 in July 1951, and who specifically agreed that it would impose obligations on a Contracting State only with respect to aliens who had entered its territory. See Gov't Br. 42-43; J.A. 224-230. Respondents try (Br. 25-26, 28) to brush aside the consensus reached by the Conference by labeling it a "snippet" of negotiating history consisting of statements by only two delegates. Yet in the same breath, respondents place heavy reliance on a statement made more than a year earlier by a single representative, Louis Henkin of the United States, at a preliminary drafting session of the Ad Hoc Committee on Statelessness and Related Problems. There, Mr. Henkin expressed the view that it did not follow from the Ad Hoc Committee's deletion of a provision requiring the granting of admission and asylum that the Convention would not apply to persons fleeing from persecution who asked to enter the territory of the contracting parties, because "[n]o consideration of public order should be allowed to overrule that guarantee." U.N. Doc. E/AC.32/SR.20, at 11-12 (Feb. 1, 1950) (quoted at Resp. Br. 26-27). Not content to rely solely on Mr. Henkin's statement of his views in 1950 of what the Convention should contain, however, respondents seek to embellish on it by taking the extraordinary step of appending to their brief an affidavit of now-Professor Henkin—dated December 15, 1992, and submitted for the first time in this case—stating his recollection of what transpired before the Ad Hoc Committee more than 42 years ago. The Court should neither accept nor attach any weight to such an evidentiary submission.

In any event, the complete answer to Professor Henkin's statement of 42 years ago and his statement of last month is that he did not represent the United States at the Conference of Plenipotentiaries. The U.S. delegate, George Warren, did not advance—and the Conference did not adopt—Professor Henkin's vision of what the Refugee Convention should embody. Article 33 was considered at two sessions of the Conference, on July 11 and July 25, 1951. At the first session, the Swiss delegate stated his government's position that "the term 'expulsion' applied to a refugee who had already been admitted to the territory of a country," while "[t]he term 'refoulement', on the other hand, had a vaguer meaning," although "it could not * * * be applied to a refugee who had not yet entered the territory of a country." J.A. 224. In his view, "[t]he word 'return', used in the English text, gave that idea exactly." *Ibid.* The French delegate "agreed with the views expressed by the representative of Switzerland," stating that "[i]t was only the idea of what was generally meant by 'expulsion' that should be retained." J.A. 225.[17] The delegates of the Netherlands, Italy, Sweden, Germany, and Belgium also expressed their agreement. J.A. 225-227.

At the session on July 25, the Dutch delegate recalled the Swiss delegate's interpretation at the prior session, noted that other delegates had supported the Swiss interpretation at that session, and reported that "[f]rom conversations he had since had with other representatives, he had gathered that the general consensus of opinion was in favour of the Swiss interpretation." J.A. 229. "In order to dispel any possible ambiguity and to reassure his Government," the Dutch delegate asked to "have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33." *Ibid.* Without objection, the President of the Conference ruled that "the interpretation given by the Netherlands representative should be placed on record." *Ibid.* This record thus shows a consensus among *all* the delegates (which included Mr. Warren of the United States) in support of the Dutch delegate's interpretation that both "expel" and "return (*'refoulement'*)" have in mind refugees who have entered the territory of the Contracting State. *Ibid.*[18]

Respondents' only answer is that the Conference must have meant to approve only the Dutch delegate's understanding that a Contracting State would have no obligation to accept a mass migration of refugees across its borders, not the specific meaning he attached to the terms in the text of Article 33.1. See Resp. Br. 27, 28, 29. But that ignores the rationale of the Dutch delegate's conclusion—that there would be no obligation to accept a

[17] This concurrence by the French delegate at the Conference of Plenipotentiaries sufficiently answers the reliance by the U.N. High Commissioner for Refugees (UNHCR) on the description more than a year earlier in reply to a question by the French member of the Ad Hoc Committee that "[i]n France and Belgium * * * *refoulement* * * * meant either deportation as a police measure or non-admittance at the frontier." UNHCR Amicus Br. 9 (quoting U.N. Doc. E/AC.32/SR.21, at 4-5 (1950)). Moreover, the discussion in the Ad Hoc Committee cited by the UNHCR indicates that although the term "refoulement" could be used in a broader sense to include nonadmittance at the frontier, in the particular context then before the Committee it referred to an alternative to expulsion as a means of removing an alien from within the country's territory. See U.N. Doc., at 5 (statement by U.K. member that U.K. practice contains no concept akin to "refoulement"); *id.* at 6 (Mr. Henkin) ("in the English text the word 'expelled' covered all cases").

[18] Respondents assert (Br. 28-29), without citation to any authority except Professor Henkin's undocumented affidavit 42 years later, that the views he expressed in the Ad Hoc Committee, "not those of the Dutch and Swiss delegates" in the Conference of Plenipotentiaries, "represented the official position of the United States government" at the Conference. That assertion cannot be squared with the decision by the U.S. delegate at the Conference (Mr. Warren) not to object to the interpretation by the Dutch and Swiss delegates, on which a "consensus" had since been reached. By contrast, Professor Henkin's affidavit addresses only the earlier work of the Ad Hoc Committee and his understanding of what that Committee intended. He does not claim any first-hand knowledge or recollection of what later transpired at the Conference. In any event, it is the position ultimately adopted by the Conference, not the position of the United States during negotiations, that controls.

mass migration *because* he and the other delegates agreed with the Swiss delegate's underlying interpretation of both "expel" and "return ('refouler')" as applying only to aliens who had already entered the territory of the Contracting State.

3. *Subsequent Interpretation.* The limited territorial reach of Article 33 that is embodied in the text and background of the Convention is confirmed by commentary contemporaneous to adoption of the Convention [19] and by subsequent events. The United States acceded to Article 33 in 1968 based upon its understanding that existing domestic immigration legislation already provided the protections that Article 33 required, and that Article 33 therefore could be implemented through Section 1253(h). See *Stevic*, 467 U.S. at 416-418. Significantly, as respondents concede (Br. 29 n.51), by virtue of *Leng May Ma*, Section 1253(h) did not then even apply to aliens who were physically present in the United States but subject to exclusion proceedings. See *Stevic*, 467 U.S. at 415. *A fortiori*, Article 33, as ratified by the United States, did not apply to aliens entirely outside the United States. See Gov't Br. 45-46; see also 37 Fed. Reg. 3447-3448 (1972) (discussed at Gov't Br. 48-49).[20]

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[19] See Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* 160-163 (1953) (discussing background and negotiating history); Paul Weis, *Legal Aspects of the Convention of 25 July 1951 Relating to the Status of Refugees*, 1953 Brit. Y.B. Int'l 6. 478, 482-483 (discussing negotiating history); Paul Weis (Legal Adviser, UNHCR), *The International Protection of Refugees*, 48 Am. J. Int'l L. 193, 198 (1954) (principle that refugees should not be expelled or returned to country where they would be threatened with persecution "applies equally to persons whose residence in the territory has been authorized, and to illegal entrants").

[20] Respondents argue (Br. 29 n.51) that the express limitation of Section 1253(h) as it then read to aliens "within the United States" "hardly proves that Article 33's territorial scope automatically shrunk to match [Section 1253(h)'s]." The point, however, is that the President and the Senate believed in 1968 that Section 1253(h) already afforded all the protection required by Article

Similarly, when Congress amended Section 1253(h) in 1980 to conform its language to Article 33, it again understood that the Protocol (and therefore the Convention) was intended to "insure fair and humane treatment for refugees *within the territory of the contracting states.*" H.R. Rep. No. 608, *supra*, at 17 (emphasis added). Respondents try to discount this statement on the ground that the report referred to both asylum (which was admittedly territorial) as well as withholding of deportation and exclusion. The difficulty with this explanation is that the quoted phrase was followed immediately by a discussion of Article 33's prohibition against expelling or returning a refugee, thereby linking that prohibition to the territorial limitation. The same view of the prohibition's reach was repeatedly reflected in international efforts, joined by the State Department, to draft a convention on territorial asylum that would have extended relief beyond that afforded by the principle barring expulsion or return of a refugee from a country of refuge to another country where he would be threatened with persecution. See Gov't Br. 47-48. Although respondents claim that those efforts are irrelevant because they reflect various nations' reluctance to accept a mandatory duty to grant asylum (see Resp. Br. 28 n.48), respondents ignore the fact that those efforts built upon the underlying premise that Article 33.1 has a limited territorial reach.[21]

Respondents' discussion of the United States' interpretation of Article 33 essentially ignores this pattern of consistent interpretation over periods of years and focuses narrowly on the brief period around 1981 when it apparently was assumed that Article 33 did apply to aliens

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33—*i.e.*, that the territorial scope of Article 33 was no broader than that of Section 1253(h), which applied only to aliens "within the United States."

[21] The reliance by amicus UNHCR (Br. 14-15) on a statement by the U.S. ambassador to the United Nations in 1974 ignores the fact that he did not address (much less endorse) the position that refoulement as used in Article 33 applies to repatriation resulting from a State's contact with aliens outside its borders.

outside the United States. See Resp. Br. 30-31. As we have explained (Gov't Br. 49-50 n.40), this assumption was not accompanied by a searching analysis of the Convention's text, structure, and negotiating history, and it was soon discredited when the United States returned to its prior position in the *Gracey* litigation. Thereafter, in 1989, the United States forcefully reaffirmed that position at a meeting of the Executive Committee of the UNHCR, where its representative stated that Article 33 "pertained only to persons already in the country and not to those who arrived at the frontier or who were travelling with the intention of entering the country but had not yet arrived at their destination." *Summary Record of the 442nd Meeting* at 16 (¶ 82), U.N. Doc. A/AC.96/SR.442 (1989). No party to the Convention expressed disagreement—a fact that cannot be reconciled with the position of amicus UNHCR (Br. 16-21) that respondents' expansive, world-wide concept of "refoulement" is the accepted view among nations.[22] Now, respondents

[22] Amicus UNHCR cites (Br. 17-18) the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45, and the 1984 Cartagena Declaration on Refugees (Cartagena de Indias, Nov. 22, 1984), but neglects to mention that the U.S. is a party to neither. The UNHCR also relies (Br. 20 & n.38) on conclusions of her Executive Committee concerning protection for asylum-seekers at sea. But although the UNHCR asserts that those conclusions "recognize that the bedrock protections of Article 33 extend to international waters, and thus beyond the borders of any particular State" (Br. 20), there is nothing in the conclusions that links them to Article 33. Rather, they are, as the UNHCR calls them, "guidelines" that reflect a broader concern for asylum-seekers. The remaining Executive Committee conclusions cited by the UNHCR (Br. 20 n.39) for the most part are endorsements of the general "principle" of nonrefoulement and shed no light on the issue here. Moreover, the UNHCR has acknowledged elsewhere that such conclusions have no legal effect. See *Summary Record of the 431st Meeting* at 12 (¶ 63), U.N. Doc. A/AC.96/SR.431 (1988) (statement of Mr. Arnaout, Dir., Division of Refugee Law and Doctrine, UNHCR). Rather, they are essentially normative and have a "relatively low status" as nonlegal instruments. Jerzy Sztucki, *The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme*, 1 Int'l J. Refugee L. 285, 307-311 (1989).

would have this Court direct a change in the Executive Branch's interpretation when neither respondents nor their amici have cited a single instance in which another Contracting State has taken the position that Article 33 applies in circumstances such as those presented in this case.[23]

IV. As respondents point out (Br. 11 n.14), because the court of appeals held that the policy of direct repatriation pursuant to Executive Order No. 12,807 violates Section 1253(h), it did not reach the questions whether the Order should be invalidated under Article 33 of the Convention or the 1981 Agreement between the United States and Haiti, or on equal protection grounds. See Pet. App. 39a. Respondents correctly identify these as alternative grounds for affirmance; but instead of devoting any of the 65 pages they have been allowed to those issues, they incorporate by reference arguments made on each issue by amici. Having done that, however, respondents state that if the Court should reverse the Second Circuit's ruling that Section 1253(h) applies outside the United States, it should remand to the Second Circuit to consider the alternative arguments. See Resp. Br. 11 n.14. These remaining arguments for invalidating the President's policy are, however, without merit.

[23] The discussion of the practice of 16 nations in the brief of amicus Association of the Bar of the City of New York (at 14-17) likewise fails to support respondents' position. Half of the laws amicus reproduces that bar expulsion or return do not even state that they apply to aliens who are not already within the territory of the country. See Br. App. (laws of Bolivia, Burundi, Dominican Republic, Malawi, Nicaragua, Peru, Spain, and Switzerland). The laws of the other countries for the most part state that no person will be refused entry or subjected to similar measures if as a result he will be returned to a country where he is threatened with persecution. Even those laws, however, contain no suggestion that the government involved believed that the measure was compelled by Article 33. Compare *United States* v. *Alvarez-Machain*, 112 S. Ct. 2188, 2195-2196 (1992).

The 1981 Agreement with Haiti confers no private rights on interdictees that are enforceable in U.S. courts. That document is essentially a law enforcement agreement between two governments. The portion on which respondents rely (Br. 31, 40) can only reasonably be construed to put the Government of Haiti on notice of the U.S. Government's then-present intention not to repatriate refugees (see J.A. 382); it accordingly was inserted to serve the purposes of the U.S. Government, not the Haitian Government or its nationals. Similarly, respondents have no equal protection claim under the Due Process Clause because that Clause is inapplicable in this setting (see 92-528 Pet. 15-18), because immigration distinctions based on an alien's nationality do not constitute discrimination based on national origin, cf. *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86 (1973), because distinctions among foreign nations is common in foreign relations, and because the interdiction and repatriation program addresses a life-threatening crisis concerning Haitian migrants. Finally, the court of appeals, in conformity with the views of every other court of appeals to have considered the question, has *already* held in this very case that Article 33 creates no private, judicially enforceable rights, independent of whatever rights are conferred by the INA. See Pet. App. 110a n.13; Gov't Br. 38 n.24; 92-6144 C.A. Br. 31-37.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case should be remanded with instructions to dismiss the relevant counts of the complaint.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JANUARY 1993

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No. 92-344

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,
Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, TRANSAFRICA, AND THE CONGRESSIONAL BLACK CAUCUS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether Executive Order No. 12,807, which was issued by the President on May 24, 1992, to authorize the United States Coast Guard to interdict Haitians on the high seas and repatriate them forcibly and without process to Haiti solely because they are Haitian, constitutes impermissible national origin discrimination in violation of the Equal Protection Clause of the United States Constitution.

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IN THE

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GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,
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v.

HAITIAN CENTERS COUNCIL, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, TRANSAFRICA, AND THE CONGRESSIONAL BLACK CAUCUS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF THE *AMICI CURIAE*

The National Association for the Advancement of Colored People (NAACP) is a nonpartisan membership organization dedicated to promoting equality of rights, eradicating racial prejudice, and protecting African-Americans under the Constitution through principles of equal justice under law. The NAACP has a strong interest in human rights and equality in the United States, Haiti, and abroad. Its legal advocacy is designed to ensure the political, educational, social, and economic equality of minority group citizens; to achieve equality

of rights and eliminate racial prejudice; and to remove barriers of racial discrimination through legislation, litigation, and advocacy. The NAACP has sought enactment and enforcement of federal, state, and local laws securing civil and constitutional rights.

The NAACP has an unrelenting history as an advocate for human rights and equality in Haiti, having maintained a long-standing interest in Haitian affairs dating back to the administration of President Woodrow Wilson. NAACP involvement has included:

- Sending a mission to Haiti in 1920 after the United States seized control of the country—ostensibly to establish and maintain order—because of its concern over a Marine report indicating that more than 3,000 Haitians were killed by American forces.
- Conducting a fact-finding mission in Haiti in 1920 by Assistant Secretary of the NAACP, James Weldon Johnson, which was instrumental in getting President Warren G. Harding to conduct a Senate investigation of the situation in Haiti.
- Relentlessly pressing for restoration of Haitian sovereignty, which resulted in the 1933 Agreement for the removal of American forces.
- Advocating the passage of emergency legislation to block the forced repatriation of thousands of Haitian refugees in 1991-92.
- Calling on President George Bush to stop the repatriation of Haitians and to resolve the plight of Haitian refugees by according them Temporary Protective Status.
- Leading a delegation in January 1992 to the camp established for refugees at the Guantanamo Naval Base in Cuba to deliver humanitarian aid, clothing, and other personal items.
- Filing an *amicus* brief in support of plaintiffs in *Haitian Refugee Center v. Baker*, 953 F.2d 1498 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992), which sought to enjoin the forced repatriation of Haitian refugees.

The Congressional Black Caucus (CBC) was founded in 1970 by thirteen black members of the United States House of Representatives to assure that the interests of black and minority Americans would be heard, and to influence legislative policies touching all aspects of America and the struggles of people of color throughout the world. In the 102nd Congress there were twenty-six members of the CBC who were vitally involved at the federal level—with both the legislative and executive branches—on matters relating to the immigration of Haitians.

Historically, the CBC has been and continues to be concerned with the inequity in immigration and foreign policy directives of the United States as it pertains to Haitian refugees and the governance of Haiti. The CBC has intervened directly, in consultation with deposed Haitian President Jean-Bertrand Aristide, to seek resolution of the continuing failure to recognize Haiti's democratically elected government. The forty members of the CBC who will be sworn in for the 103rd Congress view the pursuit of an immediate and equitable resolution of the Haitian immigration crisis as a moral imperative.

TransAfrica, the African-American foreign policy lobby for Africa and the Caribbean, has a long-standing interest in Haiti. Since its establishment in 1977, TransAfrica has monitored numerous political developments in the Caribbean and offered recommendations on United States foreign policy initiatives as they affect the region. Recently, TransAfrica has put a special focus on the plight of Haitians and their struggle to achieve democracy and respect for human rights. TransAfrica has collaborated in the past with other organizations—including the NAACP—in efforts to encourage an enlightened United States policy toward Haitian refugees.

Because petitioners' actions with respect to Haitian refugees test the parameters of constitutionally protected civil and human rights, *amici* submit this brief to assist the Court in its resolution of this case.[1]

SUMMARY OF THE ARGUMENT

As respondents demonstrate in their brief on the merits, the court below correctly concluded that President Bush's May 24, 1992 Order (the Kennebunkport Order), and petitioners' actions in implementing it, violate the express terms of Section 243(h)(1) of the Immigration and Nationality Act. *Amici* submit that the court of appeals' decision was correct in this regard and should be affirmed. We file this brief separately to urge an alternative ground for affirmance—*viz.*, that petitioners' execution of the Kennebunkport Order is also violative of the Equal Protection Clause of the United States Constitution. For even if petitioners prevail in their arguments regarding the territorial reach of Section 243(h)(1), they are still not exempt from the fundamental limits on governmental conduct imposed by the Constitution. Petitioners' interception of fleeing Haitian refugees on the high seas to return them, forcibly and without process, to their persecutors is the very sort of invidious discrimination based on national origin that the Equal Protection Clause was intended to eradicate.

A. Congress enacted the Refugee Act of 1980 to regularize the admission of aliens fleeing persecution and to limit executive discretion to dispense political asylum. To this end, Congress expressly removed from the United States' refugee program all ideological and geographic prejudices, and mandated that *all aliens*, regardless of race, religion, or national origin, shall have an equal opportunity to petition the United States Government for asylum. The Act thus explicitly *requires* the Executive

[1] The parties' letters of consent have been filed with the Court pursuant to Rule 37.3.

Branch to implement the asylum program in a nondiscriminatory manner.

The Kennebunkport Order does just the opposite: it establishes a two-track system that treats aliens fleeing their countries radically differently based on *nothing more than* their national origin. Thus, non-Haitians are afforded all the protections guaranteed by Congress in the Refugee Act: they may come to this country to apply for asylum and are given the right to present their cases to an impartial asylum officer, to be represented by counsel, to create an evidentiary record in support of their claims, and to obtain judicial review of the administrative asylum determination. In addition, non-Haitians who qualify as refugees have an absolute right not to be returned to their persecutors.

By contrast, Haitian applicants, like respondents, are denied *all* such protections. They are summarily interdicted at sea and repatriated to Haiti, where many "face political persecution and even death," without being given any opportunity whatsoever to present their asylum claims. *Haitian Centers Council, Inc. v. McNary*, No. 92-CV-1258, slip op. at 11 (E.D.N.Y. April 7, 1992), *aff'd*, 969 F.2d 1326 (2d Cir. 1992). And, notwithstanding the undisputed historical fact that as many as one third of these refugees have *bona fide* asylum claims, petitioners' interdiction program refuses to even entertain these claims because they are asserted by persons who happen to be Haitian.

B. This separate and unequal asylum program for Haitians violates not only Section 243(h)(1) of the Refugee Act of 1980, but also the Equal Protection Clause of the United States Constitution. Respondents have a constitutionally protected interest, conferred upon them by Congress, to make a meaningful application for political asylum. The Executive's denial of this right to respondents *merely because they are Haitian* creates a constitutionally impermissible distinction based on national origin.

This is particularly true where, as here, Congress—pursuant to its plenary authority over immigration matters—has clearly directed that applications for asylum be considered in a nondiscriminatory fashion.

That petitioners' discrimination against Haitians takes place on the high seas, rather than on United States soil, is of no constitutional consequence. Even were this Court to conclude that Section 243(h)(1) of the Act does not extend to aliens at sea—as it plainly does by its terms—this would not relieve petitioners of their obligation to afford Haitians over whom they forcibly take custody the equal protection of the laws. This is because these obligations flow not only from the Act, but from constitutional limits on governmental power. Once petitioners reach out and take Haitians into their custody—whether on United States soil or at sea—such aliens are within the jurisdiction of the United States even if outside its territory. Petitioners have a duty to afford aliens in such circumstances minimal constitutional protections. To permit petitioners to frustrate the neutral asylum program mandated by Congress by taking extraordinary measures to ensure that no Haitian is even physically able to make an application for asylum would make a mockery of the fundamental principles at the core of the Equal Protection Clause.

ARGUMENT

PETITIONERS' SEPARATE AND UNEQUAL ASYLUM PROGRAM FOR HAITIANS VIOLATES THE EQUAL PROTECTION CLAUSE.

A. The Executive Branch Has Created A Separate And Unequal Asylum Program For Haitians.

Congress enacted the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980)—which created the United States political asylum program—specifically to regularize the asylum application process for aliens fleeing persecution and to limit executive discretion in granting asylum. The impetus behind the program was Congress's frustration with the racial, ethnic, ideological, and geographical biases that historically have tainted grants and denials of asylum.[2] Thus, in the exercise of its plenary power over immigration matters, Congress established an asylum program that was to be blind to such factors as an alien's race or nationality.

In enacting a nondiscriminatory asylum program, Congress not only intended that the political asylum program be open to all aliens, but expressly contemplated that Haitians would be beneficiaries of the program. As Representative Shirley Chisholm explained:

> With respect to the problem of the Haitians, this bill sets up for the first time in the country's history a statutory procedure for asylum. Whether any particular Haitian will qualify under the law is a matter to be determined by the Attorney General under appropriate regulation.

[2] *See* S. Rep. No. 256, 96th Cong., 2d Sess. 4 (1979) (definition of refugee "eliminates the geographical and ideological restrictions" in preexisting law and policy); 126 Cong. Rec. 4,507-08 (1980) (statement of Rep. Chisholm) (refugee admissions should "not be tainted with ideological, geographical or racial or ethnic biases," and "refugees fleeing persecution regardless of the country they come from, on humanitarian considerations alone, should be equal in standing for entry into the United States").

126 Cong. Rec. 4,507 (1980). There is therefore no question that respondents here were among the persons Congress sought to protect under the Act.

Notwithstanding Congress's mandate that all aliens applying for asylum receive equal treatment, since President Bush's issuance of the Kennebunkport Order on May 24, 1992 (Executive Order No. 12,807, 57 Fed. Reg. 23,133 (1992)), petitioners have implemented a two-track asylum program—one for Haitians and another for non-Haitians. The asylum program for non-Haitians encompasses the panoply of procedural and substantive protections Congress mandated in the Act. Thus, the non-Haitian asylum applicant is entitled to and receives an initial "nonadversarial" interview with an asylum officer, at which the applicant may be represented by counsel and present affidavits of witnesses. 8 C.F.R. § 208.9(b) (1992). In addition, at the interview, the applicant or the applicant's attorney may make a statement or comment on the evidence. *Id.* The applicant is then given a period of time to supplement the record supporting his or her application. *Id.*

If the asylum officer makes an initial determination that the applicant's claim will be denied, the officer must notify the applicant of the intent to deny. *Id.* at § 208.17. The applicant is then entitled to *de novo* review of his or her claim in an exclusion or deportation proceeding (*id.* at § 208.2(b)), and judicial review after all administrative remedies have been exhausted. 8 U.S.C. § 1105a(c) (1988). If it is determined through these administrative and judicial proceedings that an alien qualifies for refugee status—*i.e.*, "that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group or political opinion"—the Attorney General is prohibited from deporting or returning the alien to the country from where the alien is seeking asylum. *Id.* at § 1253(h).

If the alien is Haitian, however, the process is very different. The Haitian alien—*because she is Haitian*—is

prevented from ever making an asylum application.[3] Under the Kennebunkport Order, she is forcibly interdicted at sea and summarily returned to Haiti without ever being given a meaningful opportunity to establish that she legitimately fears for her life or safety on account of her political opinions. Unlike her non-Haitian counterpart, she is denied the right to be interviewed, to present evidence on her behalf, to be represented by counsel or to have any asylum determination made reviewed by a court. Instead, she is effectively rounded up and handed over by the United States Government directly to her persecutors.

There is ample evidence to suggest that a sizeable number of the interdicted Haitians would have viable claims of asylum were they permitted to present them. Just days before the interdiction program for Haitians began, asylum officers were "screening in" 30 percent of all Haitians making applications for asylum on the ground that they had credible fears of persecution in Haiti. *See*

[3] It is undisputed that the classification scheme adopted by the Kennebunkport Order is based exclusively on national origin. Although the Order itself does not single out Haitians by name, petitioners do not contest that it was expressly directed at the "Haitian problem." In fact, just one day after the Order was signed by President Bush, the White House Press Secretary issued a statement acknowledging that the President had "'issued an executive order which will permit the U.S. Coast Guard to begin return of Haitians picked up at sea directly to Haiti.'" *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1350, 1353 (2d Cir. 1992).

Even were it not plain that the Kennebunkport Order was premised on a national origin classification, the mere fact that an order appears facially neutral will not save it from constitutional scrutiny. As this Court explained in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886):

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Id. at 373-74.

J.A. filed in Court of Appeals at 429. Petitioners' new interdiction program, however, takes no account of these facts. Nor do petitioners suggest that the political climate in Haiti has changed. Pursuant to this program, more than 3,000 Haitians have been forcibly repatriated wholly without regard to the legitimacy of their fears of political persecution.

Petitioners attempt to mute the vast differences between the asylum tracks for Haitians and non-Haitians by pointing to the fact that, under the Order, (1) Coast Guard officers are "permitted" to interview Haitians interdicted at sea, and (2) Haitians may apply for refugee status at the United States Embassy in Haiti under the "overseas refugee program." These are, however, empty protections and certainly do not rise to the level of the extensive procedural protections afforded under the program for non-Haitian asylum applicants.

First, while commanding officers of Coast Guard vessels may be permitted to interview and grant temporary refuge to interdictees in immediate and exceptionally grave physical danger, petitioners have not identified a single instance where such an interview has taken place, and *amici* are unaware of any. Moreover, it is unlikely that Coast Guard commanders have the time, the expertise, or the training required to conduct asylum interviews.

Second, it is simply not a viable option for Haitians to apply for asylum at the United States Embassy in downtown Port-au-Prince, where they run the risk that their actions are being watched by the very persons from whom they are trying to escape persecution. And, this option is even less viable for those Haitians who were interdicted at sea and returned to Haiti by the Coast Guard since, upon their return, the cutter's manifest with the interdictees' identities is handed over to the Haitian police. J.A. filed in Court of Appeals at 413-27. The Haitian Government has recently warned that those

who attempt to flee Haiti will be punished. *Haiti Warns Potential Boat People Against Flight*, Reuters, Nov. 19, 1992.[4]

While the starkness of the separate and unequal treatment of Haitians under the Kennebunkport Order should be conclusive, an extensive prior history of systematic discrimination against Haitians seeking to immigrate to this country only underscores that underlying the Order is an impermissible discriminatory purpose. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) ("The historical background of the decision is one evidentiary source [which helps to establish intent], particularly if it reveals a series of official actions taken for invidious purposes.").

As far back as the 1970s the INS in Florida established a separate "Haitian Program" to dispose of a backlog of asylum claims that had been filed by Haitians who had fled the barbaric Duvalier regime. The program had a single goal: "to expel Haitian asylum applicants as rapidly as possible." *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 513 (S.D. Fla. 1980), *aff'd on other grounds as modified sub nom. Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982). Under this "program," Haitians, unlike other applicants for asylum, were not afforded a suspension of deportation proceedings while their asylum applications were being considered, nor were they permitted the standard ten-day period

[4] Furthermore, the "overseas refugee program" in place at the Embassy offers none of the procedural safeguards available to those persons permitted to apply for asylum in the United States. 8 U.S.C. § 1157. Under this program, the applicant is not entitled to counsel at the screening interview, has no rights regarding supplementation of the record, and must have a "sponsor" who guarantees transportation to the United States for the applicant if the application is granted. In addition, there are several mandatory grounds for exclusion that are not applicable to those individuals applying under the political asylum program. *See* 8 C.F.R. §§ 207.1 *et seq.*

within which to perfect their applications for withholding of deportation. These procedures were " 'suspended insofar as Haitians [were] concerned.' " *Id.* at 513 (citation omitted). And, Haitians who asserted their fifth amendment right to remain silent during questioning about their alien status were "threatened, coerced and penalized." The end result was the denial of *every* asylum application filed by a Haitian over an eight-month period. The district court reviewing this "Haitian Program" concluded:

> The Haitians allege that the actions of INS constitute impermissible discrimination on the basis of national origin. They have proven their claim. This Court cannot close its eyes, however, to a possible underlying reason why these plaintiffs have been subject to intentional "national origin" discrimination. The plaintiffs are part of the first substantial flight of *black* refugees from a repressive regime to this country.

Id. at 451.

At one point during the height of the "Haitian problem" in the early 1980s, the INS went so far as to attempt to send Haitian immigrants to West Virginia and Texas (among other places) for processing—where there would be virtually no qualified, Creole-speaking immigration attorneys to assist them in prosecuting their claims. *Louis v. Meissner*, 530 F. Supp. 924 (S.D. Fla. 1981). The goal was to keep to a minimum the number of successful Haitian asylum applicants, and the court found the program was successful: "[B]y transferring these refugees to desolate, remote areas, wholly lacking in counsel, and/or Creole translators, INS has thwarted the statutory and regulatory rights of these refugees to representation in their exclusion proceedings." *Id.*

More recently, of course, the "Haitian problem" has again become a source of trouble to immigration officials, in the aftermath of the September 1991 fall of the

democratic government of Jean-Bertrand Aristide. The number of Haitians fleeing persecution is again on the rise, and again the INS has reacted with "special" Haitian programs. As a precursor to the Kennebunkport Order, a program was implemented whereby the United States Coast Guard would intercept boats coming from Haiti and take the Haitians on board to the United States Naval Base in Guantanamo, Cuba.[5] There the Haitians were incarcerated indefinitely, without access to telephones or legal services, and were not permitted to leave Cuba for any destination other than Haiti. They were subjected to a "pre-screening" program in which those with "credible" fears of persecution were permitted to continue on to the United States to apply for asylum, but those without were forcibly repatriated to Haiti.

Against this background of historic mistreatment of immigrating Haitians, the current program is exposed for what it is: impermissible national origin discrimination violative of the Equal Protection Clause.

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[5] More than a decade ago, a district court predicted the likelihood that the INS would implement such a program:

> [An August 20, 1978 INS memo] also contains a suggestion not previously made. [It] notes the possibility of taking intercepted boatloads of Haitians to Guantanamo Bay instead of to Florida. This proposal could arise from two possible motives. First, it could merely be an attempt to protect Florida from the potential dangers of an immigrant influx. . . . On the other hand, it could be an attempt to isolate the Haitians from the information and aid they would receive in South Florida. In the context of this case, the second motive seems prevalent. As with so many other proposals, this one was directed at Haitians alone. . . . Moreover, as noted above, the actions of lawyers representing Haitians were seen as part of the Haitian problem. By keeping the Haitians out of Miami, the INS could solve that aspect of the problem. Of course, the Haitians might be deprived of some rights as a result; but expulsion, not full consideration, was the goal.

Haitian Refugee Center v. Civiletti, 503 F. Supp. at 515.

B. The Separate And Unequal Asylum Program Violates The Equal Protection Clause.

As noted above, in enacting the Refugee Act of 1980, Congress expressly created a constitutionally protected right for *all* aliens to petition for asylum on an equal basis, and not to be returned to their persecutors if they are refugees. The separate and unequal program implemented by the Kennebunkport Order violates the Equal Protection Clause for the simple reason that it denies Haitians, solely because of their national origin, their right to apply for asylum.

Even were this Court to conclude that, despite the plain reference to "any alien" in Section 243(h)(1), the statute's reach was limited to aliens on United States soil, petitioners' actions still offend the Equal Protection Clause because these constitutional guarantees bind executive officials wherever they may act. Here, petitioners' interdiction efforts—reaching out to intercept all Haitians and forcibly turning them back to the persecution from which they fled—constitute an exercise of sovereign dominion by the United States over respondents. As such, and because this sweeping denial to all Haitians of access to the United States asylum program squarely contradicts Congress's purpose in passing the 1980 Refugee Act, petitioners' actions violate the Equal Protection Clause of the Constitution.

1. *The Kennebunkport Order Violates Respondents' Constitutionally Protected Right To Petition Our Government For Political Asylum.*

As demonstrated in respondents' brief, through the enactment of the Refugee Act of 1980, Congress conferred upon all aliens the right to petition our government for political asylum on an equal basis, irrespective of their national origin. It is axiomatic, of course, that "constitutionally protected liberty or property interests may have their source in positive rules of law creating a substantive entitlement to a particular benefit." *Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984) (citing *Meachum v. Fano*, 427 U.S. 215, 226 (1976)). *See also Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("[A] person's liberty is equally protected, even when the liberty itself is a statutory creation of the State."). In this case, respondents plainly have a liberty interest that warrants Fifth Amendment protection—the statutory right to petition our government for political asylum and for that petition to be considered in a nondiscriminatory manner.

Petitioners' interdiction program robs respondents of this constitutionally protected right to petition for asylum, because, in contrast to similarly situated aliens from other countries who may achieve refugee status based on a well-founded fear of persecution, Haitians are faced with an *irrebuttable presumption* that their asylum claims are meritless and therefore not worthy of consideration. Haitian aliens—solely by virtue of their Haitian nationality—are deprived of the opportunity even to arrive at a United States port of entry to present an application for asylum. Rather, they are physically interdicted at sea and escorted back to Haiti by the United States Coast Guard. This unequal access to the asylum application process is the very type of class-based, invidious discrimination that the Equal Protection Clause—and the Refugee Act which Congress enacted in the exercise of its plenary power over immigration—were intended to prevent.[6]

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[6] *See, e.g., Vigile v. Sava*, 535 F. Supp. 1002, 1016 (S.D.N.Y. 1982) (blanket denial of parole to all Haitians was impermissible discrimination on the basis of race and nationality), *rev'd on other grounds sub nom. Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982); *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 532 (S.D. Fla. 1980) ("The decision was made among high INS officials to expel Haitians, despite whatever claims to asylum individual Haitians might have. . . . This Program, in its planning and executing, is offensive to every notion of constitutional due process and equal protection."), *aff'd on other grounds as modified sub nom. Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

2. *Haitians Interdicted At Sea Are Entitled To Equal Protection Of The Laws.*

Even were this Court to conclude that Section 243 (h)(1) does not as a general matter extend extraterritorially to nonresident aliens, that conclusion would not relieve petitioners from complying with constitutional requirements in their actions towards these respondents. This is because the propriety of applying Equal Protection principles to petitioners' acts on the high seas flows not just from respondents' status, but also from the constitutional limits on governmental power.

This Court has long held that "there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process as guaranteed by the Constitution of the United States." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 (1974) (quoting *Mora v. Mejias*, 206 F.2d 377, 382 (1st Cir. 1953)).[7] The concept of responsible government imposes some minimal constitutional limits on the conduct of executive officials. *See Youngberg v. Romeo*, 457 U.S. 307 (1982); *Revere v. Massachusetts General Hosp.*, 463 U.S. 239, (1983). Thus, for example, the logic of the cases extending constitutional rights to resident aliens rests not simply on an assessment of the *status* of the plaintiff, but also on the requirement that agents of our government may not act arbitrarily. *See, e.g., Plyler v. Doe*, 457 U.S. 202 (1982).

In this case, petitioners should not be permitted to circumvent their obligations under the United States Constitution and the immigration laws of this Nation by systematically interdicting Haitians at sea before they reach a port of entry, where United States law unquestionably controls. Indeed, it is precisely because of such action by the United States government that respondents are unable to reach a port of entry. Once petitioners reach out and take Haitians into their custody—whether at sea or on United States soil—petitioners are obligated to extend to them minimal constitutional protections. *Cf. DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 199-200 (1989) ("[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes on it a corresponding duty to assume some responsibility for his safety and general well-being."). It would be constitutionally anomalous to allow the United States to discriminate against Haitians on account of their national origin at sea in order to avoid its obligation to afford Haitians the right to apply for asylum on a nondiscriminatory basis when they touch United States soil.

Recognizing the potential for such anomalies, members of this Court recently have urged that the reach of constitutional protections should be determined not by simplistic geographic rules, but rather, "by asking whether adherence to a specific constitutional guarantee would be impracticable and anomalous." *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring). Extending Equal Protection rights to respondents would be neither. Quite the contrary, to do so would merely afford Haitians the same statutory and constitutional rights that are already granted to non-Haitians. Indeed, any other result would "fly in the face of this Court's long-held and recently reaffirmed commitment to apply the Constitution's due proces and equal protection guarantees *to all individuals within the reach of our sovereignty.*" *Jean v. Nelson*, 472 U.S. 846, 875 (1985) (Marshall, J., dissenting) (emphasis added) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1986)).

[7] *Cf. Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931) (applying Fifth Amendment Just Compensation Clause to takings claim by extraterritorial alien plaintiff); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1386-88 (10th Cir. 1981) (recognizing that excludable aliens within the custody of the United States prior to entry have substantive and procedural due process rights relating to matters other than their exclusion from the United States).

This conclusion is likewise consistent with those cases in which this Court has held that the laws of the United States govern the conduct of American agents aboard vessels operating under the United States flag. These decisions—applying the flag doctrine—establish that a ship is essentially a floating part of the State whose flag it flies, and therefore the laws of the flag-state apply on board. As the Court explained in *Lauritzen v. Larsen*, 345 U.S. 571 (1953):

> This Court has said that the law of the flag supersedes the territorial principle, even for purposes of criminal jurisdiction of personnel of a merchant ship, because it "is deemed to be a part of the territory of that sovereignty [whose flag it flies], and not to lose that character when in navigable waters within the territorial limits of another sovereignty." (quoting *United States v. Flores*, 289 U.S. 137, 155-59).
>
> Some authorities reject, as a rather mischievous fiction, the doctrine that a ship is constructively a floating part of the flagstate, but apply the law of the flag on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her.

Id. at 585.

Similarly, in this case, the reach of available constitutional protections should, at a minimum, be defined to encompass exercises of sovereign authority and control by United States agents over respondents in international waters. Thus, when petitioners reach out and take Haitians into their custody on United States Coast Guard cutters, petitioners do not obtain limitless power over their captives. The cutters are an extension of the United States—the flag-state—and therefore constitutional and other United States legal principles extend to the cutters. On the cutters, the Haitians are entitled to the same constitutional protections that they would have been afforded on United States soil. Accordingly, petitioners' return of Haitians to Haiti under the Executive Branch's interdiction program—without affording them the opportunity to petition for asylum—deprives them of a substantial liberty interest on account of their national origin, in violation of the Equal Protection Clause.

3. *This Case Is Distinct From The Cases In Which The Court Has Declined To Extend Constitutional Protections To Nonresident Aliens.*

Unlike cases in which the Court has declined to extend constitutional protections to nonresident aliens, respondents' case involves a clear and compelling congressional mandate that a particular program affecting aliens be administered in a nondiscriminatory manner. This case does *not* present a question regarding the appropriate constitutional limits on the power of Congress, in the exercise of its plenary powers over immigration matters, to draw distinctions within or among alien groups. Nor does it present the issue whether the Executive may deny aliens constitutional protections in matters relating to immigration where Congress has delegated legislative authority or has been silent on an issue. Rather, the *sole* issue presented is whether the Executive may, consistent with the dictates of the Equal Protection Clause of the United States Constitution, discriminate on the basis of national origin where Congress *has spoken* by enacting legislation expressly forbidding such discrimination. *Amici* are aware of no case in which this Court has upheld facially discriminatory Executive action that is flatly inconsistent with legislation by Congress in the immigration area.

The presence of congressional legislation expressly forbidding discrimination among different classes of aliens in the asylum application process sets this case apart from the various lines of cases in which the Court has declined to extend to aliens equal protection of the laws

or other constitutional protections. While the Court has permitted Congress "[i]n the exercise of its broad power over naturalization and immigration" to "make[] rules that would be unacceptable if applied to citizens," *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976), those cases are inapposite because here Congress has passed legislation directing that *all* aliens be permitted to apply for asylum on a nondiscriminatory basis.

Moreover, even though this Court has upheld decisions by the Executive to preclude certain aliens from entering the United States without according them any process (*see, e.g., Knauff v. Shaugnessy*, 338 U.S. 537 (1950) (affirming the Attorney General's decision to exclude without a hearing an alien based on his determination that her entry would be prejudicial to the interests of the United States)), those cases predate Congress's enactment of the 1980 Refugee Act. The 1980 Act afforded aliens not only the right to apply for asylum but also a panoply of procedural protections to ensure that that right is not an empty one. And, even the pre-1980 cases acknowledge that due process for an alien is the procedure authorized by Congress. *Id.* at 544.

Finally, while this Court has declined to extend certain constitutional protections to nonresident aliens (*see, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (declining to extend Fourth Amendment to the search and seizure of property in a foreign country belonging to a nonresident alien arrested in the United States)), this Court has never held that nonresident aliens are entitled to *no* constitutional protection at all.[8] "'[T]he question of which specific safeguards . . . are

[8] Although the extension of the Fourth Amendment's warrant requirements to a search and seizure in a foreign country might be "impracticable and anomalous" because of "[t]he absence of local judges or magistrates available to issue warrants" (*Id.* at 278 (Kennedy, J., concurring)), this is not to say that nonresident aliens are entitled to no constitutional protections.

appropriately to be applied in a particular context . . . can be reduced to the issue of what process is 'due' . . . in the particular circumstances of a particular case.'" *Id.* at 278 (Kennedy, J., concurring) (quoting *Reid v. Covert*, 354 U.S. 1, 75 (1957)). As noted above, there is nothing "impractical or anomalous" about extending to aliens fleeing persecution in Haiti the right to petition the United States Government for asylum—a right that is accorded to similarly situated aliens from other countries. Accordingly, Haitians—like other aliens—are entitled to that right as well as to the other procedural protections which Congress has attached to that right.

CONCLUSION

For the foregoing reasons, as well as those advanced by respondents, the judgment below should be affirmed.

Respectfully submitted,

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OCTOBER TERM, 1992

GENE MCNARY, Commissioner, Immigration and Naturalization Service, et al.,

Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a judicially created canon of statutory construction against extraterritorial application of United States law justifies implying a territorial limitation on the application of 8 U.S.C. § 1253(h)(1), although this section focuses on conditions and events in other countries and does not create any possible conflict with foreign law.

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No. 92-344

In the Supreme Court of the United States

OCTOBER TERM, 1992

GENE MCNARY, Commissioner, Immigration and Naturalization Service, et al.,

Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

The International Human Rights Law Group ("IHRLG") is a nonprofit legal organization that promotes the observance of international human rights. Founded in 1978, the IHRLG provides legal assistance and information on international human rights law and has consultative status with the United Nations Economic and Social Council. With the assistance of attorneys who contribute their services, the IHRLG offers its expertise on a pro bono basis to individuals and groups concerned with respect for human rights. In United States courts, the IHRLG has participated as *amicus curiae* in many cases urging United States

compliance with international human rights norms, and in particular with norms concerning political refugees.[1]

The IHRLG urges affirmance of the decision of the court below. In affirming that decision, the United States will reaffirm its commitment to universally recognized principles of human rights and fundamental freedoms. The IHRLG has obtained the written consent of the parties to file this brief.

SUMMARY OF ARGUMENT

8 U.S.C. § 1253(h)(1) forbids the U.S. government to return aliens to countries where they would face persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion. The Second Circuit below held that the plain language of this statute proscribes the government's present policy of interdicting Haitians on the high seas and returning them to Haiti without regard to the threat of persecution there. In defense of its policy, the government urges this Court to apply a "presumption" against extraterritorial effect of U.S. statutes. But the canon of construction to which the government refers is merely a tool of statutory analysis, is not as rigid as the government claims, and is useful only where it accurately reflects legislative intent.

The rigid "presumption" urged by the government would upset settled expectations in numerous areas of law.

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[1] For example, recently the IHRLG has submitted briefs *amicus curiae* to this Court in *Saudi Arabia v. Nelson*, 923 F.2d 1528 (11th Cir. 1991), *cert. granted*, 112 S. Ct. 2937 (1992); *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992); *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991) ("*Aramco*"); and *INS v. Doherty*, 111 S. Ct. 719 (1991). In the related case of *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992), the IHRLG submitted a brief *amicus curiae* to the court of appeals.

In many cases involving antitrust, criminal law, intellectual property, securities law, civil discovery, and other areas of law, this Court and the lower federal courts have held that generally worded statutes have application outside the territorial limits of the United States.

Although this Court has determined on occasion that a statute without express extraterritorial reach applies solely within U.S. territory, the Court has done so only when it concluded either that Congress was concerned primarily with domestic affairs in enacting the statute in question, or that Congress sought to avoid conflict with foreign laws. Neither conclusion is appropriate here, for several reasons. The statute reflects the inherently international concern of Congress with the return of aliens by the U.S. government to countries where they may face persecution. It does not create any likelihood of conflict with foreign laws, for it regulates immigration into the United States and imposes constraints only on the U.S. government's own operations on U.S. flag vessels. Finally, this case concerns government conduct on the high seas, where there is no sovereign with which a conflict could arise.

Even if this Court does apply a "presumption" against extraterritoriality in interpreting 8 U.S.C. § 1253(h)(1), that "presumption" is easily overcome by the plain language of the statute and the text of the 1980 amendments.[2]

[2] This brief is focused on a discussion of the extraterritorial application of 8 U.S.C. § 1253(h)(1) (1989). Other briefs filed in this action will address in detail the legislative history of the statute.

I. THE JUDICIALLY CREATED CANON AGAINST EXTRATERRITORIAL APPLICATION OF U.S. LAW IS MERELY AN AID TO DETERMINING LEGISLATIVE INTENT

The merits of this case concern an issue of statutory construction: Does 8 U.S.C. § 1253(h)(1) forbid the government's policy of returning refugees to Haiti without any regard to the threat of persecution awaiting them there?[3] In support of its policy, the government contends that a rigid "presumption" against extraterritorial effect of all U.S. statutes prohibits the application of 8 U.S.C. §1253(h)(1) to its actions.

The canon of statutory construction on which the government relies, however, is purely a judicial creation. Such canons have vitality only to the extent they accurately reflect the intent of Congress.[4] "Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1 of the Constitution."[5] As the Chief Justice has explained in a case concerning the extraterritorial application of a U.S. statute:

> Generalities about statutory construction help us little. They are not rules of law but merely axioms of experience. They do not solve the special difficulties in construing a particular statute. The variables

[3] 8 U.S.C. § 1253(h)(1) (1989) reads: "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."

[4] *Cf. Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 672 n.3 (1986) (quoting *Block v. Community Nutrition Inst.*, 467 U.S. 304, 351 (1984)) (a presumption is controlling only "'where substantial doubt about the congressional intent exists'").

[5] *United States v. Albertini*, 472 U.S. 675, 680 (1985).

render every problem of statutory construction unique.[6]

Indeed, the government's brief, in discussing a different presumption, recognizes this same point: a presumption about legislative intent is just a presumption, and is not to be applied in a strict evidentiary sense.[7] Uncritical reliance on a judicially created doctrine, without examining whether it accurately reflects the intent of Congress at the time it enacted a particular statute, would be inconsistent with this Court's function of neutrally interpreting the law.[8]

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[6] *Weinberger v. Rossi*, 456 U.S. 25, 28 (1982) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952)) (citations omitted).

[7] Petitioner's Brief ("Br.") at 14 n.7, citing *Block v. Community Nutrition Inst.*, 467 U.S. 340, 341, 350-51 (1984) (presumption in favor of judicial review of administrative action).

[8] The government seeks to bolster its assertion of a "presumption" against extraterritoriality by reference to cases concerning presidential authority over foreign policy. But these decisions are irrelevant here; this case concerns the interpretation of a statute and Congress's intent when it passed that statute. In any event, because the position asserted by the government is contrary to the plain language and history of the statute, the discretion of the executive branch is at "its lowest ebb." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

II. THIS COURT HAS ADDRESSED THE EXTRATERRITORIAL REACH OF U.S. LAWS ON A STATUTE-BY-STATUTE BASIS

A. In Many Instances, This Court Has Applied Generally Worded Statutes Extraterritorially

It is not accurate to assert, as does the government, that the courts have uniformly presumed in all areas that U.S. law does not apply outside of U.S. territory.[9] Rather, this Court and the lower federal courts have carefully examined each statutory scheme before deciding whether a particular statute applies outside this country. Applying the government's rigid presumption without regard to its appropriateness to each particular statute would not only be unfaithful to the intent of Congress, but would also upset settled expectations in many different areas of law.

It has long been established that international law imposes no absolute limits on U.S. jurisdiction.[10] This Court has repeatedly recognized that Congress may legislate extraterritorially, and the Court's role is simply to

[9] Petitioner's Brief ("Br.") at 27 (requiring a "'clearly expressed, affirmative intention' by Congress" in order for this presumption to be overcome). In *Aramco* the government took a different position from that it urges here: "Congress need not express its intent to regulate outside the United States in any particular way. . . . [B]road jurisdictional language suffices to sustain extraterritorial applications of federal statutes that prevent evasion of the thrust of the laws of the United States . . . beyond our borders." Brief for the EEOC at 10 (citations and interior quotes omitted).

[10] The canon of statutory construction to which the government refers had its origin in the long discredited notion that legislation can have no effect beyond territorial boundaries. *Compare Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) *with International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (overruling *Pennoyer*).

interpret statutes to assess their intended scope.[11] In making this assessment, this Court has concluded in a limited number of cases that certain generally worded U.S. statutes apply only within U.S. borders. As discussed in Section III below, it has done so only in circumstances that are inapplicable to 8 U.S.C. § 1253(h)(1). In numerous other instances, this Court has held that generally worded federal statutes have extraterritorial application.

U.S. antitrust laws contain only general language with no clear statement that they apply outside of this country. In *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909), this Court held that the antitrust laws could not be applied to conduct occurring abroad. However, this Court overruled that decision in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 (1962),[12] and has repeatedly cited with approval cases holding that the Sherman Act applies to conduct abroad that has effects in the United States.[13] In both government enforcement actions[14] and private damage

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[11] *Aramco*, 111 S. Ct. at 1230; *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284-85 (1949); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 381 (1948).

[12] This Court characterized *American Banana* as having been "substantially overruled" by *Continental Ore* in *W.S. Kirkpatrick & Co. v. Environmental Technonics Corp.*, 493 U.S. 400, 407 (1990). *See also United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927) (applying antitrust laws to conduct outside of U.S.).

[13] *See United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945), *cited with approval by Continental Ore*, 370 U.S. at 704-05; *Steele v. Bulova Watch Co.*, 344 U.S. 280, 288 n.16 (1952); *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 114 n.8 (1969). *Accord* Restatement (Third) Foreign Relations Law of the United States § 415 (1987); Department of Justice, Antitrust Enforcement Guidelines for Int'l Operations 29-34 (1988).

[14] *See, e.g.*, Department of Justice, *Japanese Bid Rigging Case Settlement* (Dec. 19, 1989) (press release), *reprinted in* 7 Trade Reg. Rep. (CCH) ¶ 50,028 (Feb. 6, 1990); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945); *In re Grand Jury Investigation of the Shipping Indus.*, 186 F. Supp. 298, 309-10 (D.D.C. 1960); *In re Investigation of World Arrangements with Relation to the Prod., Ref., Transp. & Distrib. of Petroleum*, 13 F.R.D. 280, 284-85 (D.D.C. 1952). Earlier this year, the Department of Justice announced that it was prepared to challenge the anticompetitive behavior of foreign companies or cartels whose behavior limits or interferes with the ability of U.S. exporters to compete in an overseas market. Department of Justice, *Justice Department Will Challenge Foreign Restraints on U.S. Exports Under Antitrust Laws* (Apr. 3, 1992) (press release), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,108 (Apr. 14, 1992).

actions,[15] settled law now establishes that the antitrust laws can apply to conduct occurring outside this country.

This Court has held that generally worded federal criminal statutes can apply to conduct outside the United States.[16] Extraterritorial application of U.S. law is particularly important in the area of criminal narcotics enforcement, where the lower federal courts have routinely applied generally worded statutes to conduct outside this country despite the absence of any clear statement of extraterritorial

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[15] *See, e.g., Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (1976), *aff'd after remand*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1291-92 (3d Cir. 1979); *Montreal Trading, Ltd. v. Amax, Inc.*, 661 F.2d 864, 869-70 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982). *See also In re Insurance Antitrust Litigation*, 938 F.2d 919, 931-34 (9th Cir. 1991), *cert. granted sub nom. Merrett Underwriting Agency Mgt., Ltd. v. California*, 113 S. Ct. 52 (1992), in which the United States as *amicus curiae* supported the Ninth Circuit's extraterritorial application of the antitrust laws under a *Timberlane* analysis. Br. at 23-24 (filed Aug. 7, 1992).

[16] *E.g., Kawakita v. United States*, 343 U.S. 717 (1952) (extraterritorial application of treason statute); *United States v. Bowman*, 260 U.S. 94 (1922) (extraterritorial conspiracy to defraud United States); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820) (piracy on the high seas); *cf. Blackmer v. United States*, 284 U.S. 421, 438-39 (1932) (sustaining extraterritorial subpoena to require U.S. citizen to appear at criminal trial).

effect.[17] Many other generally worded criminal statutes also have been applied extraterritorially to protect significant interests of this country.[18] To adopt a rigid "presumption" against extraterritorial application of U.S. statutes would endanger important federal civil and criminal enforcement efforts in many areas.[19]

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[17] *United States v. Larsen*, 952 F.2d 1099, 1100-01 (9th Cir. 1991) (applying to high seas narcotics statutes silent as to extraterritoriality); *United States v. Wright-Barker*, 784 F.2d 161, 166-68 (3d Cir. 1986) (same); *United States v. Baker*, 609 F.2d 134, 136-39 (5th Cir. 1980) (same); *United States v. Brown*, 549 F.2d 954, 956-57 (4th Cir.) (applying generally worded narcotics statutes to conduct in foreign country), *cert. denied*, 430 U.S. 949 (1977). *Cf. Ford v. United States*, 273 U.S. 593, 602 (1927) (applying National Prohibition Act to high seas despite its silence on issue of extraterritoriality).

[18] *See, e.g., United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204-06 (9th Cir. 1991) (applying generally worded accessory-after-the-fact statute extraterritorially to murder of U.S. agent abroad); *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991) (applying U.S. criminal law extraterritorially to international terrorist); *United States v. Thomas*, 893 F.2d 1066 (9th Cir. 1990) (applying extraterritorially statute proscribing creation of obscene materials); *United States v. Parness*, 503 F.2d 430, 439-40 (2d Cir. 1974) (applying RICO extraterritorially), *cert. denied*, 419 U.S. 1105 (1975); *United States v. Noriega*, 746 F. Supp. 1506, 1516-19 (S.D. Fla.) (conspiracy, aiding and abetting, RICO and Travel Act applied extraterritorially to foreign dictator), *mandamus denied, stay denied*, 917 F.2d 1543 (11th Cir. 1990); *cf. United States v. Bank of Nova Scotia*, 691 F.2d 1384, 1389-90 (11th Cir. 1982) (extraterritorial subpoena to investigate money laundering), *cert. denied*, 462 U.S. 1119 (1983).

[19] *See, e.g., United States v. Javino*, 960 F.2d 1137, 1142 (2d Cir.) (reversing Firearms Act conviction on the ground that the government was required to prove that an illegal explosive was manufactured in the United States, on the theory that, under *Aramco*, statute must be presumed not to apply to manufacturer outside this country), *cert. denied*, 61 U.S.L.W. 3355 (1992).

The Lanham Act contains broad jurisdictional language that does not make specific reference to conduct occurring abroad. Nonetheless, this Court held in *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), that the Lanham Act applies extraterritorially to prevent trademark infringement abroad that has effects in this country.[20] Similarly, U.S. patent law has been held to apply extraterritorially to prevent infringing effects in this country,[21] as has U.S. copyright law,[22] although neither statute contains an explicit declaration of extraterritorial application.

"The Securities Exchange Act is silent as to its extraterritorial application," as a court of appeals recently observed.[23] But it is well established, both in government enforcement actions[24] and in private damage actions,[25]

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[20] *See also Reebok Int'l, Ltd. v. Marnatech Enters., Inc.* 970 F.2d 552, 555 (9th Cir. 1992).

[21] *See, e.g., Spindelfabrik Suessen-Schurr v. Schubert & Salzer Maschenfabrik Aktiengesellschaft*, 903 F.2d 1568, 1577-78 (Fed. Cir. 1990) (sustaining injunction requiring foreign defendant to label all machines sold anywhere in the world as: "Not available for sale, use or delivery to the United States").

[22] *See Update Art, Inc. v. Modiin Pub., Ltd.*, 843 F.2d 67, 73 (2d Cir. 1988); *Peter Starr Prod. Co. v. Twin Continental Films, Inc.*, 783 F.2d 1440 (9th Cir. 1986).

[23] *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir.) (also holding that federal securities laws apply extraterritorially), *cert. denied*, 112 S. Ct. 638 (1991).

[24] *SEC v. Tome*, 833 F.2d 1086, 1087-88 (2d Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988); *SEC v. Certain Unknown Purchasers*, 817 F.2d 1018 (2d Cir. 1987), *cert. denied*, 484 U.S. 1060 (1988); *United States v. Cook*, 573 F.2d 281, 283-84 (5th Cir.), *cert. denied*, 439 U.S. 836 (1978); *SEC v. Vaskevitch*, 657 F. Supp. 312 (S.D.N.Y. 1987); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981); *see also SEC v. Minas de Artemisa, S.A.*, 150 F.2d 215 (9th Cir. 1945); Restatement (Third) Foreign Relations Law of the United States § 416, comment a (1987).

that the federal securities laws are applicable to foreign conduct. Like the securities laws, the U.S. commodities laws do not explicitly address the issue, but have routinely been held to apply extraterritorially.[26]

The Jones Act does not specifically state that it applies outside this country, but in *Lauritzen v. Larsen*, 345 U.S. 571, 576-77 (1953), this Court interpreted it to apply extraterritorially where the United States had the predominant interest in the acts at issue.[27] The United States exercises, and this Court has sustained, extraterritorial jurisdiction to impose taxes.[28] The Federal Rules of Civil Procedure do not specifically mention discovery outside of this country, but this Court has held that they do authorize extraterritorial discovery, even in some circumstances where such discovery would conflict with foreign secrecy

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[25] Dozens of lower court decisions have applied the securities laws extraterritorially in private actions. *See, e.g., Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261-62 (2d Cir. 1989); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 425 (9th Cir. 1983); *Continental Grain (Australia) Pty., Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409 (8th Cir. 1979); *Schoenbaum v. Firstbrook*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969); *cf. Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 30-31 (D.C. Cir. 1987).

[26] *See, e.g., Tamari v. Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103, 1107-08 (7th Cir.), *cert. denied*, 469 U.S. 871 (1984); *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041 (2d Cir. 1983); *Transnor (Bermuda) Ltd. v. B.P. North Am. Petroleum*, 738 F. Supp. 1472, 1478 (S.D.N.Y. 1990).

[27] Using the balancing formula set forth in its decision, the *Lauritzen* Court declined to exercise jurisdiction over the particular transaction at issue in the case. However, in a later case, this Court held that the same factors supported extraterritorial application of the Jones Act. *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970).

[28] Restatement (Third) Foreign Relations Law of the United States §§ 411-12 (1987); *Cook v. Tait*, 265 U.S. 47 (1924).

and nondisclosure laws.[29] To adopt the government's position in this case — that Congress must "clearly express" its "affirmative intention" before any U.S. statute on any subject can be applied outside this country, Br. at 27 — would be contrary to precedent in all of the areas of law discussed above.

B. Congress May Legislate Extraterritorially Based Either on the Effects Principle or on the Nationality Principle of Jurisdiction

Based on the trend illustrated in the cases discussed above, the Restatement (Third) Foreign Relations Law — the first draft of which appeared in 1980, the year §1253(h)(1) was amended — specifically deleted the proposition found in the Restatement (Second) Foreign Relations Law that, as a general matter, U.S. laws did not have extraterritorial effect.[30] The Restatement (Third) §

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[29] *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 543-44 (1987); *Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197, 204-06, 211-12 (1958).

[30] The Restatement (Third) discussed the decision to omit the notion that U.S. statutes apply only domestically:

> In the past, the jurisdiction of a state to make its law applicable in a transnational context was determined by formal criteria supposedly derived from concepts of state sovereignty and power. . . . Increasingly, the practice of states has reflected conceptions better adapted to the complexities of contemporary international intercourse. . . . Territoriality and nationality remain the principal bases of jurisdiction to prescribe, but in determining their meaning rigid concepts have been replaced by broader criteria[.]

Id., introductory note at 235-37. Against this background, the Court cannot assume that in 1980 Congress intended that all generally worded

402 recognizes that the United States exercises extraterritorial jurisdiction based on the effects of conduct within U.S. territory and on the U.S. nationality of the actors.[31] The Restatement (Third) § 403 goes on to recognize that, where there is an actual conflict with the laws of some other nation, interests of international comity[32] may lead U.S. courts not to exercise jurisdiction if another nation has a clearly greater interest in the person or activity at issue.[33]

In the case at bar, jurisdiction is appropriate under both the nationality principle and the effects principle. 8 U.S.C. § 1253(h)(1) regulates the actions of U.S. nationals — the U.S. government itself — on U.S. flag vessels.[34]

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statutes would be applied only within this country. *Cf.* Restatement (Third) Foreign Relations Law of the United States § 403, Reporters' Note 2 (older statutes, from time when regulation was less ambitious, are less likely to reflect an intent to reach extraterritorially than more recent statutes).

[31] *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 n.7 (D.C. Cir. 1984) (international law generally recognizes five theories of jurisdiction: objective, territorial, national, protective, and universal), *cert. denied*, 470 U.S. 1003 (1985).

[32] *See Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) ("'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition, which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws").

[33] *See Timberlane*, 549 F.2d at 597 (applying comity principle in antitrust context).

[34] *See United States v. Bowman*, 260 U.S. 94 (1922) (Congress has power to regulate actions of U.S. citizens outside the territorial jurisdiction of the U.S. whether or not the act punished occurred within the territory of a foreign nation); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 381 (1948) (legislation concerning U.S. citizens cannot

Moreover, barring refugees from the United States or admitting them to this country has an immediate and substantial effect here.[35] Even were there a possible conflict with foreign law, U.S. law should still apply, because the interest of the United States in regulating its own immigration policy outweighs the possible interest of any other country.

III. 8 U.S.C. § 1253(h)(1) DOES NOT PRESENT ANY OF THE CONCERNS THAT HAVE LED THIS COURT TO CONCLUDE THAT CERTAIN OTHER U.S. STATUTES SHOULD APPLY ONLY WITHIN U.S. TERRITORY

This Court has concluded on occasion that certain U.S. statutes apply only within U.S. borders. At times, the Court has reached this conclusion on the ground that Congress was concerned primarily with domestic conditions when it enacted the statute.[36] On other occasions, this Court has reached this conclusion because it assumed that Congress desired to avoid conflict with

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offend the dignity or right of sovereignty of another nation).

[35] *Cf. United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) (applying antitrust laws extraterritorially because of effects within the U.S.); *Alfadda v. Fenn*, 935 F.2d 475 (2d Cir.) (same as to securities laws), *cert. denied*, 112 S. Ct. 638 (1991).

[36] *Aramco*, 111 S. Ct. at 1230; *Foley*, 336 U.S. at 285.

foreign law.[37] Neither ground justifies interpreting §1253(h)(1) to apply only within this country.

A. Extraterritorial Application of 8 U.S.C. §1253(h)(1) Is Appropriate Because the Statute Is Inherently International in Focus and Will Not Cause Conflict with Foreign Law

When Congress enacted and amended 8 U.S.C. §1253(h)(1), it was not primarily concerned with domestic affairs, unlike some other statutes this Court has found to apply only domestically.[38] Refugees necessarily come from outside the United States, and the decision to return them to other countries or grant them asylum involves detailed consideration of inherently international matters. The definitions of "refugee" and "asylum" require continual assessment of the threat of persecution that applicants face in foreign countries.[39] If the issue is

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[37] *See, e.g., Aramco*, 111 S. Ct. at 1230; *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963). *Cf. United States v. Bowman*, 260 U.S. 94, 102 (1922) (criminal fraud statute applies extraterritorially since it provides no possible offense to the "dignity or right of sovereignty" of any other country); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 284-85 (1952) (since no conflict with foreign law, Lanham Act applies extraterritorially); *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 543-44 and n. 27 (1987) (extraterritorial discovery is permissible where it is consistent with international comity).

[38] *See Edye v. Robertson*, 112 U.S. 580, 595 (1884) (statutes regulating immigration are adopted pursuant to federal power over foreign commerce). The fact that § 1253(h) was amended in order to conform its language to that of Art. 33 of the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1968, 19 U.S.T. 6223, is conclusive evidence of its international nature. The government concedes that § 1253(h) was amended for this purpose. Br. at 36.

[39] *See* 8 U.S.C. § 1101(a)(42)(A) (1989) (defining who is a "refugee"); 8 U.S.C. § 1158(b) (1989) (defining standard for "asylum").

whether Congress was concerned with conditions outside this country, it would be more plausible to apply a "presumption" in favor of the extraterritorial application of §1253(h)(1) than one against such application.[40]

Similarly, there is no danger that U.S. immigration statutes such as § 1253(h)(1) will conflict with foreign law or international law. The immigration laws simply regulate how the U.S. government itself admits or excludes aliens. Section 1253(h)(1) neither forbids nor requires any action by any private party. There is no possibility that foreign entities will be unfairly subject to inconsistent regulation should a U.S. immigration statute be applied outside this country.[41] A finding of likely persecution may incur the resentment of foreign governments, but Congress has demonstrated that it is willing to incur this consequence when fundamental human rights so require.[42] In any

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[40] *Cf. United States v. Evans*, 667 F. Supp. 974, 981 (S.D.N.Y. 1987) (Arms Export Control Act inherently international in scope; extraterritorial effect given), *later proceeding*, 844 F.2d 36 (2d Cir. 1992).

[41] The employment and labor cases on which the government relies are therefore inapposite. *See Aramco*, 111 S. Ct. at 1234 (declining to apply antidiscrimination laws extraterritorially because of possibility that employers' duties would conflict under U.S. law and law of place of employment); *Foley Bros.*, 336 U.S. at 284-85 (declining to apply "Eight Hour Law" to U.S. contractors abroad because of possible conflict with local employment laws); *Benz*, 353 U.S. at 147 (declining to apply U.S. labor law to foreign seamen on foreign vessel because of possible conflict with foreign law); *McCulloch*, 372 U.S. at 20-22 (same).

[42] Indeed, the recognition of the international community that refugee claims to asylum are to be decided without reference to relations among governments is implicit in the 1951 U.N. Convention Concerning the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, and its 1967 Protocol Relating to the Status of Refugees, Jan. 31,

event, such resentment does not differ depending on whether the refugee fleeing persecution is within or outside the territory of the United States.

The government infers a rigid "presumption" against extraterritoriality from a line of cases beginning with *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949) and ending with *Aramco*, 111 S. Ct. 1227 (1991).[43] In these cases, the Court declined to apply labor and employment statutes extraterritorially, noting that conflicts with foreign law would necessarily result.[44] Even though the Restatement (Third) Foreign Relations does not recognize a general

1967, 19 U.S.T. 6223, on which the Refugee Act of 1980 is based.

[43] The other primary cases in that line of authority, *McCulloch* and *Benz*, provide the government little support. Although both cases discuss the "presumption," both involve disputes between foreign seamen and their foreign employer while docked at a *United States* port. The ultimate rationale for decision in both cases was legislative history of the statutes at issue declaring that the statutes were meant to protect "American workingmen" rather than aliens. *McCulloch*, 372 U.S. at 20; *Benz*, 363 U.S. at 144. Because they involve activity in the United States, neither case is properly understood as raising extraterritoriality issues. Rather, both are cases where the Court declined to exercise jurisdiction out of comity with other nations that had greater interests in the disputes at issue. *Cf. Wildenhus's Case*, 120 U.S. 1 (1887) (applying U.S. law to murder of one alien by another alien while both aboard a foreign-flag vessel in U.S. waters). *See also Lauritzen v. Larsen*, 345 U.S. 571, 576-77 (1953) (Jones Act applies to foreign sailors on foreign vessel where United States has predominant interest in acts at issue); *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970) (same).

[44] Thus, the Court's recent holding in *Aramco* is grounded on one of the primary rationales for placing limits on the extraterritorial application of U.S. law: avoidance of conflict with foreign laws. Although the language of *Aramco* appears to support the government's assertion of a rigid "presumption," the Court's decision was made in light of the local nature of employment law. There is no reason for this Court to depart from its statute-by-statute approach to extraterritoriality in this case.

"presumption" against extraterritoriality, it does conclude that U.S. extraterritorial jurisdiction is limited "over predominantly local activities, such as industrial and labor relations[.]"[45] That proposition does not justify a rigid rule against extraterritoriality in the wholly different context of immigration law.

B. Because § 1253(h)(1) Regulates the Government's Own Operations, Its Application Should Not Be Limited to U.S. Territory

None of the reasons that have led this Court to apply certain statutes only within this country applies to a statute regulating the operations of the government itself. Section 1253(h)(1) simply removes the government's discretion to return aliens to countries where persecution would threaten their lives or freedom. Because no other country can regulate the actions of U.S. government officials, there is no possibility that such a statute regulating government decisionmaking could conflict with foreign law.[46]

Nor is there any reason to assume that Congress is less concerned with the operations of the U.S. government when they occur outside this country. Were the government's assertion of a rigid "presumption" correct,

[45] Restatement (Third) Foreign Relations Law of the United States § 414 comment c (1987). *Cf. id.* at § 403, Reporters' Note 2: "It is more plausible to interpret a statute of the United States as having extraterritorial reach when the act is international in focus, for example the Trading with the Enemy Act, . . . than when it has a primarily domestic focus, such as the National Labor Relations Act[.]"

[46] As discussed above, this Court has long held that statutes without any express statement of extraterritorial effect can be applied to U.S. nationals abroad, under the nationality principle of jurisdiction. If generally worded statutes are interpreted to apply to U.S. nationals abroad, they necessarily should apply to the government's own operations outside U.S. boundaries.

none of the laws that assure regularity in the workings of government — the Administrative Procedure Act, the Merit Systems Protection Act, the Ethics in Government Act, or the Freedom of Information Act, to name a few — would apply to actions taken or information gathered outside our boundaries.[47] The government does not refer to any case in any court in which a "presumption" against extraterritoriality has been applied to statutes structuring governmental decisionmaking.

C. Applying § 1253(h)(1) to U.S. Flag Vessels on the High Seas Neither Threatens To Interfere with the Sovereignty of Other Nations Nor Presents any Possibility of Conflict with Foreign Law

Even if this Court finds it is appropriate to apply a rigid "presumption" against extraterritoriality with respect to application of a statute to govern the conduct of U.S. government officials within the territory of foreign nations, it should not apply such a rule on the high seas. As stated above, one of the reasons this Court has given for interpreting some other statutes not to apply abroad has been the assumption that Congress was reluctant to interfere with the sovereignty, rights, and laws of other countries.[48] But the "high seas" are open to all countries and are not subject to the exclusive jurisdiction of any

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[47] None of these statutes specifically states that it applies extraterritorially, although none is limited to actions with purely domestic effect.

[48] *Cf. Weinberger v. Rossi*, 456 U.S. at 32 (considerations against applying U.S. law extraterritorially apply with less force to U.S. enclaves overseas).

sovereign.[49] Thus, the application of § 1253(h)(1) on the high seas neither interferes with the sovereignty of any nation nor presents any possibility of conflict with foreign or international law.[50]

The fact that the government's interdiction of Haitian refugees occurs aboard U.S. Coast Guard vessels on the high seas reinforces the conclusion that U.S. statutes such as § 1253(h)(1) should apply to the program. Each country has jurisdiction over its own flag vessels while on the high seas.[51] Indeed, aboard noncommercial government

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[49] *United States v. Louisiana*, 363 U.S. 1, 33-34 (1959) ("[t]he high seas . . . are generally conceded by modern nations to be subject to the exclusive sovereignty of no single nation"); *Skiriotes v. Florida*, 313 U.S. 69, 78 (1941) (the high seas belong to no sovereign); *The Hamilton*, 207 U.S. 398, 403 (1907) (same); Law of the Sea: Convention on the High Seas, Sept. 30, 1962, art. 2, 13 U.S.T. 2312, 2314 ("The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty").

[50] *See United States v. Bowman*, 260 U.S. 94, 102 (1922) (applying U.S. criminal law on the high seas) ("We cannot suppose that when Congress enacted the statute or amended it, it did not have in mind that a wide field for such frauds upon the Government was in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States, and therefore intend to include them in the section"); *Beattie v. United States*, 756 F.2d 91, 93-94 (D.C. Cir. 1984) (applying Federal Tort Claims Act to Antarctica, a part of the global commons analogous to the high seas, but not to foreign countries); *Smith v. United States*, 953 F.2d 1116, 1120-24 (9th Cir. 1991) (Fletcher, J., dissenting) (same), *cert. granted*, 112 S. Ct. 2963 (1992). *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) is not to the contrary; in that case the Court held that a statute applying to torts committed "in the United States" did not apply to a tort committed on the high seas 5,000 miles from this country. *Id.* at 440.

[51] Restatement (Third) Foreign Relations Law of the United States § 502(2) (1987) ("The flag state may exercise jurisdiction to prescribe, to adjudicate, and to enforce, with respect to the ship or any conduct that takes place on the ship"). The reluctance of the Court to apply U.S. law to foreign flag vessels was a significant consideration in

vessels on the high seas, no other country can have jurisdiction.[52] Thus, applying § 1253(h)(1) in this case creates no possible conflict with foreign law.

The fact that this statute is to be applied on the high seas makes inapposite Justice Stevens' concurrence in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2150 n.4 (1992), on which the government relies.[53] The regulation at issue in *Lujan* applied the Endangered Species Act to the territory of the United States *and* to the high seas;[54] the issue was whether the Act should be interpreted to apply *also* to the territory of foreign sovereigns, where conflicts with foreign laws might result. By contrast, no possibility of conflict is presented by the application of § 1253(h)(1) on the high seas.[55]

McCulloch and *Benz*; the same concerns should lead the Court to apply U.S. law aboard the U.S. flag vessels here.

[52] Restatement (Third) Foreign Relations Law of the United States § 522(1) (1987) (a "ship owned or operated by a state and used only on government noncommercial service, enjoys complete immunity on the high seas from interference by any other state"); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). *Cf. Foley*, 336 U.S. at 577 (no language in "Eight Hour Law" "gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control").

[53] *Lujan* concerned the Endangered Species Act of 1973, which requires the Secretary of the Interior to consult with other agencies so as to minimize the effects of agency programs on endangered wildlife. The issue in the case was whether this consultation requirement applied to U.S. foreign aid projects in other nations. 112 S. Ct. at 2135.

[54] 112 S. Ct. at 2135, citing 50 C.F.R. § 402.01 (1991).

[55] In any event, two of the three Justices to reach the merits in *Lujan* would have held that the statute under consideration applied without geographic limitation. *Id.* at 2151 (Blackmun & O'Connor, JJ., dissenting). *Astoria Fed. Sav. and Loan Ass'n v. Solimino*, 111 S. Ct. 2166, 2170 (1991), on which the government also relies, addressed the extraterritorial application of U.S. law only in dicta.

IV. THE PLAIN LANGUAGE AND HISTORY OF §1253(h)(1) OVERCOME ANY ARGUMENT AGAINST ITS EXTRATERRITORIAL APPLICATION

As the Second Circuit correctly held, whatever the strength of any presumption against extraterritoriality in the context of immigration law, this canon of statutory interpretation is easily overcome by the language and history of § 1253(h)(1). That section reads:

> The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.[56]

As the government concedes (Br. at 33), the term "alien" is defined to include aliens outside the territory of the United States.[57] The 1980 amendment to § 1253(h) supports the application of this plain language to government actions involving aliens outside the United States. Before that amendment, the statute read:

> The Attorney General is authorized to withhold deportation of any alien *within the United States* to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.[58]

As the Second Circuit below held, the deletion of the territorial limitation makes it explicit that Congress intended the statute to include aliens outside the United

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[56] 8 U.S.C. § 1253(h)(1) (1989).

[57] 8 U.S.C. § 1101(a)(3) (1989).

[58] 8 U.S.C. § 1253(h) (1970) (emphasis supplied).

States.[59] This change in language overcomes any "presumption" against extraterritoriality.[60] To hold otherwise would exalt a judicially created rule for determining congressional intent beyond its appropriate status as a mere tool of neutral statutory analysis.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Second Circuit should be affirmed.

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[59] As the government concedes (Br. at 50 n.40), this was the contemporaneous interpretation of the 1980 amendment by the Departments of Justice and State. Contemporaneous administrative interpretations shed significant light on the intent of the political branches at the time of enactment. *Cf. Aramco*, 111 S. Ct. at 1235 (deferring to administrative interpretation most nearly contemporaneous with passage of statute, rather than to more recent change in interpretation).

[60] As noted above, this brief is focused on a discussion of the extraterritorial application of § 1253(h)(1). Other briefs filed in this action will address in detail the legislative history of the statute.

(7)

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, *ET AL.*,

Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* THE LAWYERS COMMITTEE FOR HUMAN RIGHTS IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS*

Amicus curiae the Lawyers Committee for Human Rights offers this brief, with the consent of the parties, in support of respondents Haitian Centers Council, Inc., *et al.* The Lawyers Committee is a national legal resource center working in the area of human rights, refugee and asylum law. In 1980, after the enactment of the Refugee Act[1], the Committee created a national Refugee Project to monitor proposed legislation and regulations, to litigate significant cases regarding refugees and asylum, and to assist in providing legal representation to applicants for political asylum. *Amicus* believes that the resolution of this case may affect numerous applications for protection under the 1951 Convention[2] and the 1967 Protocol relating to the Status of Refugees[3] (Convention and Protocol).

STATEMENT OF THE CASE

Article 33 of the 1951 Convention (hereinafter "Article 33"), which embodies the core obligation assumed by the United States when it ratified the 1967 Protocol,[4] provides that:

> No contracting party shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.

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[1] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of Title 8 of the United States Code).

[2] July 28, 1951, 189 U.N.T.S. 150.

[3] Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

[4] G.S. Goodwin-Gill, *The Refugee in International Law* 72 (1983). Under Article I(1) of the 1967 Protocol, the United States has agreed to apply Articles 2 to 34 inclusive of the 1951 Convention.

On May 24 of this year, President Bush issued what has become known as the Kennebunkport Order,[5] which instructs the Coast Guard to interdict vessels on the high seas suspected of containing Haitians destined for U.S. shores and to return such persons directly to Haiti without regard to whether their life or freedom would be threatened there on the grounds listed in Article 33.

Respondents sought to enjoin petitioners from enforcing the Kennebunkport Order on the ground that it violated both federal statutes and Article 33. The district court held that the statutes on which respondents relied did not prohibit petitioners from returning refugees to their persecutors if the persons were intercepted before reaching our shores. It recognized that Article 33 does prohibit the return of such refugees, but it denied relief because it believed that it was constrained by the Second Circuit's decision in *Bertrand* v. *Sava*, 684 F.2d 204 (2d Cir. 1982), which the court read as holding that "the Protocol's provisions are not self-executing." App. 167a.[6] The court said that this ruling rendered Article 33 "a cruel hoax . . . not worth the paper it is printed on," *id.*, and it invited the Second Circuit to reconsider its *Bertrand* decision. The Second Circuit had no occasion to consider the self-execution issue, however, as it held that the statutes respondents relied on did prohibit the petitioners from intercepting refugees on the high seas and returning them to their persecutors.

This brief addresses only the question whether Article 33 is self-executing. The issue arises only if this Court holds that the statutes respondents rely on do not apply to refugees on the high seas, but that Article 33 does apply to such refugees. We therefore examine the self-execution issue in this brief on those assumptions.

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[5] Exec. Order No. 12807, 57 Fed. Reg. 23133 (1992).

[6] "App." refers to the appendix to the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

Petitioners argued below that Article 33 is non-self-executing in four respects. First, they contended that Article 33 did not become the law of the land when the United States acceded to the Protocol, but had to be given domestic legal force by legislation. Second, they argued that the Protocol did not itself prohibit the United States from delivering refugees to their persecutors, but instead obligated the United States to pass legislation prohibiting such delivery. Third, they maintained that Article 33 did not establish rights that are amenable to judicial enforcement without legislative clarification. Finally, they argued that the Protocol does not itself confer a private right of action. The first three arguments lack merit, the last is irrelevant.

By virtue of the Supremacy Clause, Article 33 became the "supreme Law of the Land" upon ratification. Its status as law of the land does not depend, as petitioners argued below, on the treaty-makers' intent to give it domestic legal force. This Court need not decide whether the treaty-makers can deprive a treaty of domestic legal force by affirmatively manifesting an intent that it *not* be the law of the land, for the treaty-makers did not manifest any such intent with respect to the Protocol. Thus, the obligation established by Article 33 has the force of domestic law in the United States.

Under *Foster v. Nielson*, 27 U.S. (2 Pet.) 253 (1829), Article 33 would be unenforceable in court if the obligation it establishes is an obligation to "pass acts" prohibiting the return of refugees to their persecutors. But the plain text of Article 33, this Court's decisions in *INS* v. *Cardoza Fonseca*, 480 U.S. 421 (1987), and *INS* v. *Stevic*, 467 U.S. 407 (1984), and the statements of executive branch officials when the Protocol was transmitted to the Senate make it clear that the obligation established by the Protocol is not an obligation to pass legislation, but an obligation not to return refugees to their

persecutors. Article 33 directly limited petitioners' discretion and conferred correlative rights on refugees.

There is nothing about the obligation imposed by Article 33 that makes it unsuitable for judicial enforcement. The obligation is mandatory, immediately effective, and clear-cut. This Court had little trouble in *Stevic* discerning the content of the non-refoulement obligation, and petitioners and the courts enforce it routinely with respect to refugees who have reached our shores.

Finally, this Court need not decide whether Article 33 itself confers a private right of action for injunctive relief. Respondents' right of action is conferred by the APA.

ARGUMENT

The lower courts consider the doctrine of self-executing treaties to be "one of the most confounding in treaty law."[7] They appear to agree that a non-self-executing treaty is one that must be "implemented" by legislation before it may be applied by the courts, but they differ on why legislation is necessary – that is, on what it is that a non-self-executing treaty fails to accomplish *ex proprio vigore*. Courts have, at various times, discussed the "self-execution" question as if it concerned each of the deficiencies that petitioners ascribe to Article 33.

The label "non-self-executing" can properly be used to describe a treaty with any of those deficiencies. Outside the treaty context, it is understood that the term does not describe a fixed legal attribute of a law, but denotes that a law does not accomplish some legal end itself but contemplates that the end

[7] See *United States* v. *Postal*, 589 F.2d 862, 876 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); *United States* v. *Noriega*, No. 88-79-Cr, 1992 U.S. Dist. LEXIS 18686 (S.D. Fla. Dec. 8, 1992).

will be accomplished through further legislation.[8] With respect to treaties, however, the term has produced confusion because it has mistakenly been thought to be a term of art concerning a doctrine unique to treaties.

Although petitioners below attempted to perpetuate and exploit the lower courts' confusion, their submissions ultimately recognized what commentators have been saying for some time:[9] the term "self-executing" does not describe a fixed legal attribute of treaties and is analytically useless and potentially very confusing.[10] Petitioners argued below that, when the BIA

[8] Thus, the dormant commerce clause is sometimes described as self-executing because it itself preempts state regulation, *see, e.g., Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 7 (1986), while the takings clause has been described as self-executing because it itself confers a remedy for its violation, *see, e.g., First Eng. Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 305 (1987). *See generally* Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1082, 1120-1121 (1992).

[9] *See* Vázquez, *supra* note 8, at 1120-21 (1982); Koh, *Transnational Public Law Litigation*, 100 Yale L.J. 2347, 2383 (1991); Paust, *Self-Executing Treaties*, 82 Am. J. Int'l L. 760, 783 & n.132 (1988); McDougal, *The Impact of International Law upon National Law: A Policy-Oriented Perspective*, 4 S.D.L. Rev. 25, 77 (1959) ("The words self-executing and non-self-executing embrace neither intrinsic nor historic meaning nor magic to resolve the issue."); McDougal, *Remarks*, 45 Proc. Am. Soc'y Int'l L. 102 (1951).

[10] Failure to recognize the diversity of concepts that may be analyzed using the "self-executing" label produces confusion, for example, when one court holds that a treaty is not self-executing because it does not itself confer a cause of action and a later court applies that precedent to dismiss a treaty claim in a case in which the litigant does not rely on the treaty as the source of his cause of action. This is the mistake petitioners asked the courts below to make when, relying on *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985), and other cases, *see infra* note 50, they asked the court to dismiss respondents' complaint on the ground that the Protocol does not itself confer a private right of action and is thus not self-executing. *See generally infra* Part IV.

described the Protocol as self-executing in *In re Dunar*, 14 I.&N. Dec. 310 (1973), it meant only that the Protocol of its own force established an obligation to enact legislation prohibiting the return of refugees to a place where they would be persecuted.[11] This is perhaps the least likely way in which a court would use the term, and we do not agree that is what the BIA meant. But we agree that, as a matter of English usage, the term may be understood in that sense. Petitioners' attempt to explain away the BIA's statement in *In re Dunar* thus demonstrates as convincingly as anything we could have said that the term "[is] essentially meaningless, and . . . the quicker we drop it from our vocabulary the better for clarity and understanding."[12] We join petitioners in urging the Court not to attach any weight to conclusory statements that Article 33 is or is not self-executing.[13] Below, we examine in turn the four distinct respects in which petitioners have claimed Article 33 is not self-executing.

I. THE PROTOCOL IS THE SUPREME LAW OF THE LAND.

The Supremacy Clause declares that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const., art. VI, cl. 2. The Protocol is a treaty, valid and in force, made under the

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[11] *See* Defendants' Opposition to the Entry of Injunctive Relief Respecting the New Executive Order (E.D.N.Y.) ("Def. Opp.") 29; Brief for the Appellants in *Baker* ("*Baker* Brief") 28. We refer to the Government's briefs in *Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1245 (1992), as briefs in *Baker*.

[12] McDougal, 45 Proc. Am. Soc'y Int'l L. 102.

[13] These include the statements in the principal cases on which petitioners rely. *Baker, supra*; *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 751 (1991); *Haitian Refugee Ctr., Inc.* v. *Gracey*, 600 F. Supp. 1396 (D.D.C. 1985), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987).

authority of the United States. It follows that the Protocol is the supreme law of the land, and thus has the force of domestic, as well as international, law.

Despite the clarity and force of the foregoing syllogism, petitioners have argued that the Protocol does not have domestic legal force.[14] This rather bold position is based on the notion that treaties that are not "self-executing" are not the law of the land. Such treaties, according to petitioners, may impose international obligations on the United States, but those international obligations do not have the force of domestic law.[15] This notion has been combined by certain courts with the idea that a treaty's self-executing character is largely a matter of intent, to produce the conclusion that a treaty is the law of the land only if the U.S. treaty-makers intended that it be the law of the land.[16] As applied to the Protocol, this analysis accepts that the Protocol might establish an international

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[14] *See* Opp. Brief (2d Cir.) ("Opp. Brief") 35 ("No evidence suggests that the United States intended by its acceptance of the Protocol to incorporate Article 33 into domestic law . . ."); Def. Opp. 26. ("There is no indication that the United States intended by its acceptance of the Protocol to incorporate Article 33 into domestic law as a private cause of action."). *See also* Appellants Reply Brief ("*Baker* Reply Brief") 8 ("[Treaties] may impose obligations under international law on the United States as a contracting party without themselves creating obligations under domestic law . . ."); *Baker* Brief 24 (same as Def. Opp.); Defendants' Mem. Opposing Injunctive Relief in *Baker* (S.D. Fla.) ("Def. Opp. in *Baker*") 30 ("[T]he statement and actions of the executive and Congress provide the best indication of whether Article 33 was intended to become part of domestic law directly, without implementing legislation."); *id*. at 32 ("Had Article 33 of the Protocol been viewed as self-executing, that provision itself would have been domestic law . . .").

[15] *See Baker* Reply Brief 8, *supra* note 16.

[16] This was essentially the reasoning of the court in *Postal*, *supra*, on which petitioners relied below and in *Baker*. *See* Opp. Brief 35; Def. Opp. 26; *Baker* Reply Brief 8; *Baker* Brief 24-26; Emergency Motion for Stay Pending Appeal in *Baker* (11th Cir.) 19; Def. Mem. Opp. in *Baker* 29-30, 34.

obligation not to deliver refugees to their persecutors, but maintains that this obligation does not have the force of domestic law unless the President and/or the Senate so intended.

If our Constitution did not include the Supremacy Clause, all treaties would have the force of law internationally but not domestically. That has long been the rule in Great Britain. In that country, treaties can never be applied by domestic law-applying officials, such as judges, but must instead be executed by Parliament, whose statutes would in turn be enforced by domestic law-applying officials.[17]

This, however, is the rule that the Framers of our Constitution rejected when they adopted the Supremacy Clause. By declaring treaties to be laws, the clause gives treaties domestic legal force and thus makes them directly enforceable by domestic law-applying officials (such as judges) without the need for execution by domestic law-making officials (*i.e.*, Congress).

Petitioners' view of the self-execution doctrine cannot be squared with the text of the Supremacy Clause. It would interpret the Supremacy Clause as a *power-conferring* provision: the clause would give the treaty-makers the *power* to make treaties the law of the land. But that is not what the clause says. The Constitution gives the treaty-makers the power to make treaties, but the Supremacy Clause by its terms gives the treaties they make automatic domestic legal force. Moreover, the clause purports to give domestic legal force to "all" such

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[17] O'Higgins & Dublin, *Unlawful Seizure and Irregular Extradition*, 36 Brit. Y.B. Int'l L. 279, 301 (1960). This is so regardless of the treaty's terms. For example, even if a treaty purports itself to set a tariff at a given level, domestic law-applying officials would collect the tariff as set by prior statutes until Parliament executed the treaty by amending the earlier statute. *See Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 274-75 (1796) (Iredell, Circuit Justice), *reversed on other grounds*, *id.* at 237, 241-42, 245, 256.

treaties. A power-conferring interpretation of the clause is thus incompatible with the clause's declaration that "all" such treaties "shall be" the law of the land.

The power-conferring theory is also unsupported by the available evidence of the Framers' intent in adopting the clause. The Supremacy Clause was the mechanism adopted by the Framers to deter and correct treaty violations by the United States.[18] Before the adoption of the Constitution, state officials (including judges) were adhering to the British rule. They acknowledged that the United States had an international obligation to comply with its treaties, but they understood their duty as law-applying officials to be to enforce the existing state laws, even if they conflicted with treaty obligations, until those laws were modified or amended by the state legislatures.[19] The lack of a mechanism for deterring or correcting treaty violations attributable to the United States was among the deficiencies of the Articles of Confederation that most concerned the Framers.[20]

There was a consensus at the Constitutional Convention that the new Constitution should include an effective mechanism for correcting treaty violations. Two principal schemes were considered. Under the Virginia plan, treaties would not themselves have superseded pre-existing domestic laws once ratified. Congress was instead to have the power to "negative" state laws that conflicted with the nation's treaty obligations.[21] This scheme would thus have retained the British rule, but rather than rely on the state legislatures to repeal conflicting state laws, it would have given that responsibility to the federal legislature.

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[18] *See generally* Vázquez, *supra*, at 1102.

[19] *See Ware v. Hylton*, 3 U.S. (3 Dall.) at 277.

[20] *See generally* Vazquez, *supra*, at 1102.

[21] *See id.* at 1104-1106.

This scheme was ultimately rejected in favor of the New Jersey plan's scheme. Under this plan treaties themselves were given the force of law through the Supremacy Clause. 2 Farrand, *The Records of the Federal Convention of 1787* (rev.ed.1966) 27-29. Thus, the treaties themselves were to operate to amend or repeal inconsistent laws without action by either the state or federal legislatures. The state courts were specifically instructed to give effect to treaties as law, and the federal courts' jurisdiction was extended to cases "arising under" treaties to ensure that the state courts complied with this directive. The scheme that was adopted thus gave the courts, rather than the legislatures, the first-line responsibility of enforcing the nation's treaties insofar as they related to individuals.

This scheme was not uncontroversial. There were objections to giving treaties the force of law but excluding from the treaty-making process the most representative house of the legislature. Gouverneur Morris noted this anomaly and proposed correcting it by giving the House a role in the making of treaties. *Id.* at 392. Madison objected that it would be inconvenient to give such a role to as numerous a body as the House, as secrecy and dispatch were thought to be indispensable in treaty-making. *Id.* Morris responded that he was not disposed to make treaty-making too easy: the greater the difficulty of making treaties, Morris stated, the more seriously they will be taken. *Id.* at 393. Thus, the proposal for correcting the perceived anomaly was defended on the ground that it would advance the Supremacy Clause's purpose of maximizing treaty compliance.[22] No one suggested correcting the anomaly by adopting the British rule, which would have permitted one body to make treaties but another to give them domestic legal force. Such a rule would have compromised the

[22] Ultimately, Morris' proposal was rejected, primarily because of the perceived need for secrecy in the negotiation of treaties. *Id.* at 394.

Supremacy Clause's purpose by increasing the likelihood that treaties would bind us internationally but not be judicially enforceable domestically. This is, of course, what the power-conferring version of the Supremacy Clause would do. History thus undermines the power-conferring theory and fully support the Supremacy Clause's plain text: "all" treaties, once ratified, are the "supreme Law of the Land."

The power-conferring version of the self-execution doctrine is based not on text or history, but on dicta from this Court's decisions seeming to suggest that treaties that are not self-executing are not the law of the land, along with language suggesting that whether or not a treaty is self-executing is a matter of intent. As discussed in the next section, however, this Court's cases do not support the radical departure from the Supremacy Clause's text that the power-conferring theory would work. This Court's most recent treaty decision rejects the notion that a non-self-executing treaty is not the "law of the land," and confirms that the "self-execution" question has nothing to do with the treaty's status as "law of the land."[23]

There are, to be sure, circumstances in which a treaty that is valid and in force internationally does not have the force of domestic law, notwithstanding the Supremacy Clause. For example, if a subsequently enacted statute or a subsequently ratified treaty conflicts with an earlier treaty, the later statute or treaty supersedes the earlier treaty as the law of the land, even though the earlier treaty might continue to bind us internationally. It may well be that the President and Senate have the power to terminate a treaty's domestic legal force even without entering into a later treaty. If so, it may well follow that the President and Senate have the power affirmatively to

[23] *United States v. Alvarez Machain*, 112 S.Ct. 2188, 2195 (1992) ("The Extradition Treaty has the force of law, and if, as respondent asserts, it is self-executing, it would appear that a court must enforce it on behalf of an individual . . .").

countermand the Supremacy Clause's ordinary effect with respect to a particular treaty at the time of the treaty's ratification.[24] Recognizing this power, however, would do far less violence to the text of the Supremacy Clause than acceptance of the power-conferring theory would. The Supremacy Clause would remain the rule, and it would take an affirmative act of the treaty-makers to reverse it with respect to a particular treaty. But to go further and accept the petitioners' argument that a treaty lacks domestic legal force unless the treaty-makers have affirmatively demonstrated an intention to give it domestic legal force would require such a radical departure from the clause's terms that the interpretation must be rejected, if only on textual grounds.

This court need not consider whether the treaty makers have the power to deprive a treaty of its domestic legal force at the time of ratification by an affirmative act, such as by expressing an intention that the treaty not have domestic legal force. There is no evidence that the treaty makers entertained any such intent with respect to Article 33. Indeed, the statements petitioners rely on establish the opposite.

As petitioners recognize, Article 33 prohibited the United States from doing certain things that the Attorney General previously had discretion to do under then-existing statutes. *See* Opp. Brief 33-34 n.20. As this Court observed in *Stevic*, "the most significant difference" between Article 33 and the text of existing immigration laws was that the former "gave the refugee an entitlement to avoid deportation to a country in which his life or freedom would be threatened," whereas the latter

[24] The President and Senate purported to do this when they attached to the Torture Convention, Treaty Doc. 100-20, a reservation to the effect that the treaty was not "self-executing," by which they meant that the treaty lacked domestic legal force. *See* S. Exec. Report 101-30, Report of the Senate Committee on Foreign Relations on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 101st Cong., 2d Sess. at 12 (1990).

"merely provided the Attorney General with the discretion to grant withholding of deportation on grounds of persecution." 467 U.S. at 428-29 n.22. Despite the acknowledged differences between the Protocol and the statutory text, it was understood at the time of our accession that "no amendment of the existing statutory language was necessary" because it was contemplated that the Attorney General would "implement" and "honor the requirements of" Article 33 without legislative action. *Id.* at 429-30. This, of course, is fully consistent with the conclusion that Article 33 was immediately effective upon ratification as domestic law. It was unnecessary to amend the statute because Article 33 itself, as law of the land, limited the Attorney General's discretion. If, as this Court said in *Stevic*, Article 33 gave refugees a "right" and "entitlement" not to be delivered by the United States into the hands of their persecutors and existing domestic law did not give them that right, and if, as petitioners argue, Article 33 did not have the force of domestic law, then amendment of existing legislation *would have been required*. In light of the acknowledged differences between the treaty and the statute, the statement that no amendment of the statute was required must have been a recognition that Article 33 itself had domestic legal force and superseded the inconsistent provisions of the immigration law. To reach any other conclusion would be to accuse our treaty-makers of having no intention to grant to refugees the "right" and "entitlement" that Article 33 required us to provide them. The Court should be slow to attribute such bad faith to our treaty-makers.[25]

[25] *Cf. Chew Heong v. United States*, 112 U.S. 536, 540 (1884):

> Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact, that the honor of the government and people of the United States is involved in every inquiry whether rights secured by

Petitioners rely on this Court's statement in *Stevic* that, notwithstanding the difference between the dictates of Article 33 and the language of existing statutes, "the Attorney General could naturally accommodate the Protocol simply by exercising his discretion to grant such relief in each case in which the required showing was made, *and hence no amendment of the existing statutory language was necessary.*" Opp. Brief 33-34 n.20 (quoting *Stevic*, 467 U.S. at 429 n.22 (emphasis supplied by petitioners)). According to petitioners, "[t]his passage clearly indicates that if the Attorney General had been unable to accommodate the Protocol under the INA's provisions as then written, an 'amendment' of those provisions would have been 'necessary' for aliens to obtain relief." *Id.* This reads far too much into this Court's footnote.[26] To be sure, because Article 33, as law of the land, would have superseded any existing statute that required the Attorney General to deliver refugees into the hands of their persecutors, no amendment of such a statute would have been "necessary" to enable the Attorney

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> such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.

[26] Petitioners' argument below that the Ninth Circuit followed this tortured line of reasoning in *Aguilar* when it relied on *Stevic* for the proposition that Article 33 was not self-executing is ludicrous. Citing footnote 22 of *Stevic*, the Ninth Circuit said that "the Protocol" was not self-executing, *Aguilar*, 883 F.2d at 680, without referring to any particular provision. The court was apparently relying on this Court's statement that Article 34 was "precatory and not self-executing." The Ninth Circuit thus made a common, and clear, error: it assumed that if one provision of a treaty is not self-executing, none is. The settled rule, however, is that one provision of a treaty may be self-executing while others are not. *Restatement (Third) of the Foreign Relations Law of the United States* § 111 Comment h (1987).

General to disregard it. Nevertheless, an amendment may have been considered "necessary" to eliminate the confusion that might be generated by a facial discrepancy between the law as written and Article 33.

Indeed, Congress subsequently did amend the immigration statutes to make it clear that the Attorney General did not have the discretion to deliver refugees into the hands of their persecutors. As the House Judiciary Committee Report states, and as this Court made clear in *Stevic*, this change was made "*for the sake of clarity*," *Stevic* at 428; H.R. Rep No. 96-608 at 17-18 (1979) (emphasis added). *See also* Pet. Brief 36 (noting that Congress "clarif[ied]" the statute when it amended it in 1980). These statements clearly reflect the understanding that Article 33 itself had domestic legal force. The amendment could have "clarified" existing law only if Article 33 itself served to limit the Attorney General's discretion.[27] Article 33 could have this effect only if it had the force of domestic law.[28]

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[27] For this reason, petitioners' statement that "Congress's subsequent efforts in 1980 to clarify 8 U.S.C. § 1182(h) to conform its language to that of the Protocol . . . is irreconcilable with the notion that the Protocol had independent domestic force" is baffling. Opp. Brief 36. The amendment could have "clarified" existing law only if the Attorney General's discretion had been limited before then. This Court's statement that the amendment was made "for the sake of clarity" thus establishes that Article 33 itself limited the Attorney General's discretion.

[28] Petitioners also rely on statements to the effect that "[a]ccession to the Protocol would not impinge adversely upon established practices under existing laws in the United States." S. Exec. K, 90th Cong., 2d Sess. III (1968) (message from Pres. Johnson), cited at Opp. Brief 36 n.21. *See also id.* at VII, VIII (report of Secretary of State Rusk) (same); S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 4 (1968); *id.* at 2 (Sen. Comm. report); 114 Cong. Rec. 29391 (1968) (statement of Sen. Mansfield). Those are merely statements that it was not then established practice to intercept refugees on the high seas and return them to the persecuting nation. The statements to the effect that "refugees in the United States have long enjoyed the protection and the rights which the Protocol calls for," quoted at Opp. Brief 36 n.21, mean only that "[t]he

In sum, Article 33 is the law of the land by virtue of the Supremacy Clause. There is no requirement that the President and Senate "intend" that a treaty be the law of the land. The power-conferring theory is incompatible with the clause's text and unsupported by either history or case law. This Court need not decide whether the President and the Senate can affirmatively countermand the Supremacy Clause with respect to a particular treaty upon ratification, for there is no evidence that the President and the Senate entertained any such intent in this case. Thus, if the statutes on which respondents rely are indeed territorially limited in their scope, as petitioners argue, and if Article 33 is not so limited, as the district court correctly found, then Article 33, as "supreme Law of the Land," itself limits petitioners' discretion to deliver respondents into the hands of their persecutors in Haiti.

II. ARTICLE 33 DOES NOT REQUIRE IMPLEMENTING LEGISLATION.

Though this Court recognized early on that the Supremacy Clause dispensed with the need for legislative action to give treaties domestic legal force,[29] it also recognized that certain treaties may nevertheless not be applied by the courts before implementing legislation has been enacted. Such treaties have become known as "non-self-executing" treaties. The distinction between self-executing and non-self-executing treaties has its source in this Court's decision in *Foster v. Neilson*, the only case in which this Court has denied relief on the ground that a treaty

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President and the Senate believed that the Protocol was *largely* consistent with existing law." *Stevic*, 467 U.S. at 417 (emphasis added). They hardly support the conclusion that, to the extent of any differences, the President and Senate intended that the Protocol not have domestic legal force. The statements discussed in the text establish the contrary.

[29] *Ware v. Hylton*, 3 U.S. (3 Dall.) at 237.

was not self-executing.[30] Although petitioners would interpret *Foster* as a virtual resuscitation of the British rule, Chief Justice Marshall's opinion shows that the category of "non-self-executing" treaty he recognized is quite limited in scope and does not embrace Article 33.

Marshall began the relevant portion of the *Foster* opinion by describing the domestic effect of treaties in countries that do not have a Supremacy Clause:

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

27 U.S. (2 Pet.) at 314. Petitioners cite lower court decisions that, in their view, interpret the foregoing language as establishing "a general presumption" that treaties may not be enforced in court by individuals.[31] In reality, this language merely restates the British rule. In the sentences that immediately follow, the Court made it clear that this rule was

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[30] With the possible exception of the cryptic discussion in *Cameron Septic Tank Company v. City of Knoxville, Iowa*, 227 U.S. 39, 50 (1913).

[31] *See, e.g.*, Opp. Brief 34-35, and Def. Opp. in *Baker* 28, citing *Tel-Oren*, 726 F.2d at 808; *United States* v. *Bent-Santana*, 774 F.2d 1545, 1550 (11th Cir. 1985); *Canadian Transport Co. v. United States*, 663 F. 2d 1081, 1092 (D.C. Cir. 1980); *Dreyfus v. Von Finck*, 534 F.2d 24, 29-30 (2d Cir.), *cert denied*, 429 U.S. 835 (1976); *Handel* v. *Artukovic*, 601 F. Supp. 1421 (C.D. Cal. 1985). We do not agree that these decisions say that there is any such presumption, but, if they do, they are based on misreadings of *Foster* and are erroneous for the reason set forth in the text. The other decision that petitioners cited to support their proposed general presumption, *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989), cannot be read to support any such presumption.

rejected by the Framers when they adopted the Supremacy Clause, which establishes the *opposite* rule in our country:

> In the United States, *a different principle is established*. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision.

Id. (emphasis added). *Foster* thus reaffirms that the Supremacy Clause rejects the British rule, gives all treaties the status of domestic law, and establishes as the general rule in this country that treaties *do not* require implementation by the legislature before they may be applied by the courts.

Marshall did say that a treaty is to be regarded by the courts of justice as the equivalent of an act of legislation only if it "operates of itself, without the aid of any legislative provision." This qualification is the source of the doctrine of self-executing treaties. To the extent the terms self-executing and non-self-executing can be said to be terms of art as applied to treaties, they refer to the distinction Marshall drew in *Foster*. The distinction, however, has "not [been] particularly well understood" by the courts.[32]

Foster involved a treaty providing that certain "grants shall be ratified and confirmed to the persons in possession [of the lands.]" 27 U.S. (2 Pet.) at 315. In determining whether the provision "operate[d] of itself, without the aid of any legislative provision," Marshall framed the issue as follows: "Do these words act directly on the grants, so as to give validity to those not otherwise valid? or do they pledge the faith of the United States to pass acts which shall ratify and confirm [the grants]?" *Id.* at 314. The issue was thus one of treaty interpretation, governed by the words of the provision, and the relevant

[32] *Noriega*, *supra note 6*, at 16.

question was whether those words "ratified and confirmed" the grants themselves or instead obligated the United States to "pass acts" to "ratify and confirm" the grants in the future. The Court read the "shall be ratified" language as contemplating a future act or ratification, but it said that its decision would have been different if the provision had said that the grants were "hereby" ratified and confirmed. *Id.* at 314.

That the issue was whether the treaty affirmatively contemplated a future act of ratification, and that this was a matter of treaty interpretation, were confirmed five years later in *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833), in which the Court reversed itself and held that the treaty involved in *Foster* was indeed self-executing. The Court's about-face on this point was the result of its review of the Spanish text, which provided that the grants "shall remain ratified and confirmed . . ." These words, the Court held, denoted that the grants were ratified and confirmed "by force of the instrument itself"; the treaty did not, as the Court had previously concluded, "stipulat[e] for some future legislative act." 32 U.S. at 88-89.[33]

Foster and *Percheman* thus establish that, although treaties in the United States do not as a general matter require legislative implementation before they may be applied by the courts, this rule may be modified by the parties through the treaty itself.[34]

[33] It is noteworthy that the so-called doctrine of self-executing treaties, which has so confounded the courts, has been constructed around a decision that the Court quickly thereafter concluded was wrongly decided.

[34] This conclusion was not as self-evident as Marshall made it out to be. Just as treaties in Great Britain require implementing legislation regardless of what the parties intended, the Court could have held that, in light of the supremacy clause, treaties in the United States do not require implementing legislation even if the parties intended to require it. In other words, it could have held that the rule that legislation is not required is not one that may be reversed by agreement. Underlying the Court's holding that legislation is required when the parties affirmatively so agree, therefore, is an unarticulated holding about our domestic separation of powers. Nevertheless, after the

The obligations the parties undertake in the treaty remain the law of the land, but if the obligation is an obligation to accomplish certain ends in the future through legislation, then our courts may not treat the end as having been accomplished until the legislation is enacted.[35]

Article 33 would fall within Marshall's category of non-self-executing treaty if, instead of itself prohibiting the return of refugees, it had provided that the contracting parties "shall enact laws prohibiting the return of refugees to a place where they would be persecuted."[36] This Court's decisions in

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Court's domestic separation-of-powers holding in *Foster*, legislation is required if the parties intended to require it.

[35] The test differs from the power-conferring theory discussed above in that (a) the default rule remains that no legislation is required, and (b) a stipulation of *the parties to the treaty*, not the unilateral intent of the U.S. treaty-makers, is necessary to reverse the rule. By focussing on what the parties agreed to (as opposed to what the U.S. treaty-makers unilaterally intended) the *Foster* rule is faithful to the Supremacy Clause, which conformed our domestic law with our international treaty obligations. The power-conferring theory, by contrast, would create a discrepancy between our domestic law with international obligation.

[36] The decision on which the district court and petitioners relied below, the Second Circuit's decision in *Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982), apparently concluded that Article 33 established the latter obligation. Notwithstanding the provision's clear prohibitory language, the court concluded that Article 33 does not itself obligate the United States not to return refugees to countries where they would be persecuted, but instead obligates the United States to "adjust[]" its domestic law to prohibit the return of refugees to such countries. 684 F.2d at 218. For this proposition, the court relied on its earlier decision in *Stevic* v. *Sava*, 678 F.2d 401, 406 (2d Cir. 1982), *reversed*, 467 U.S. 407 (1983). What the Second Circuit had said in *Stevic*, however, was that, "[s]ince Article 33 of the Convention imposes an absolute obligation upon the United States, standards developed in an era of discretionary authority require some adjustment." *Id.* That does not suggest that the adjustment must be accomplished by legislation. As discussed above, it was clearly contemplated that, to the extent there was a discrepancy between

Cardozo-Fonseca and *Stevic* make it clear, however, that the obligation imposed by Article 33 is not an obligation to "pass acts" prohibiting the return of refugees to countries where they would be persecuted; rather, Article 33 itself, of its own force, "imposed a mandatory duty on contracting States not to return an alien to a country where his 'life or freedom would be threatened' on account of one of the enumerated reasons." *Cardoza Fonseca*, 480 U.S. at 429 (footnote omitted). *See also Stevic*, 467 U.S. at 429 n.22 (Article 33 gives refugees "right" and "entitlement").

This conclusion was inescapable. The terms of Article 33 cannot be construed as a requirement of legislation. Furthermore, numerous statements of executive branch officials at the time of the Protocol's transmission to the Senate establish the understanding of the United States that the Protocol conferred substantive rights directly on refugees. In transmitting the Protocol to the Senate for its advice and consent, President Johnson described the Protocol as "a comprehensive *Bill of Rights for refugees* fleeing their country because of persecution on account of their political views, race, religion, nationality, or social ties."[37] "*Foremost among the*

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what existing federal statutes required and what was required by the Protocol, U.S. officials would give effect to the Protocol's requirements as law within the framework of then-existing statutes – *i.e.*, without legislation. Executive and judicial officials were to adjust their standards without legislative action because the treaty itself so required.

[37] Message from the President of the United States transmitting the Protocol Relating to the Status of Refugees, S. Exec. K, 90th Cong., 2d Sess. III (1968) (emphasis added). *See also* Letter of Submittal of the Secretary of State Rusk to President Johnson regarding Protocol Relating to the Status of Refugees, S. Exec. K, 90th Cong., 2nd Sess. V (1968) ("[The Refugee Convention] constituted the most comprehensive *codification of the rights of refugees* so far attempted on an international level." (emphasis added)); S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 4 (1968) (testimony of Lawrence A. Dawson, Acting Deputy Director, Officer of Refugee and Migration Affairs) ("The Protocol

humanitarian rights which the Protocol *provides* is *the prohibition* against expulsion or return of refugees to any country where they would face persecution." *Id.* (emphasis added). This "foremost . . . right" guaranteed by the Protocol is precisely the "right" embodied in Article 33. In light of these statements, it cannot be maintained that Article 33 "stipulated for some future legislative act."

Petitioners argued below that Article III of the Protocol is such a stipulation. Article III requires the contracting states to "communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of the present Protocol." This provision does not support petitioners' conclusion for two reasons. First, as petitioners acknowledged below, in many countries treaties never have domestic legal force. Def. Opp. 30; *Baker* Brief 25. In such countries, treaties always require implementing legislation. Article III's reference to "laws [the contracting parties] may adopt" may thus be a reference to the laws adopted by states that require legislation in all circumstances. It does not suggest that the parties contemplated legislation by states that give treaties automatic domestic legal force. Second, the Protocol includes provisions that appear to contemplate legislation even in countries, such as the United States, in which treaties have automatic domestic legal force. Article 34, for example, was described by this Court in *Stevic* as "precatory and not self-executing." 467 U.S. at 429 n.22. Thus, Article III's reference to "laws [the contracting parties] may adopt" may also be a reference to laws giving effect to provisions of the Protocol, such as Article 34, that leave the parties with discretion regarding the manner of achieving those provisions' aspirations. In light of these two possibilities, Article III simply

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is a human *rights* document." (emphasis added)); *id*. at 6 ("[T]he Protocol deals entirely in the sphere of standards of protection and *rights for refugees*." (emphasis added)).

does not support an inference that, despite Article 33's clear prohibitory language, the provision actually imposes an obligation to pass acts to prohibit the return of refugees to countries where they would be persecuted.[38] In sum, this Court's prior decisions and the statements of the Executive upon transmitting the Protocol to the Senate for its advice and consent confirm what the plain text of Article 33 leaves no room to doubt: the provision itself imposes an immediately effective obligation not to deliver refugees into the hands of their persecutors. It does not impose an obligation to take steps in the future to prohibit the return of refugees to their persecutors. It is accordingly "self-executing" in the sense contemplated in *Foster* and *Percheman*.

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[38] For the foregoing reasons, the district court decision in *Gracey*, *supra*, relied on below by petitioners, is simply wrong. Judge Bork's solitary concurrence in *Tel-Oren*, 726 F.2d at 798, is similarly flawed. *Postal* does not support petitioners' reliance on Article III. The treaty provisions the *Postal* court was referring to provided that "*[e]very* State shall take the necessary legislative measures" to achieve certain ends. 589 F.2d at 876 (footnote omitted; emphasis added). They thus appeared to contemplate the enactment of legislation on the part of *every* party – whereas the Protocol simply requires parties to inform the United Nations of the laws they "may" enact, thus acknowledging that legislation may not be required in some countries. Moreover, in *Postal* the quoted language appeared *in each of the provisions to which the court referred*, whereas Article 33 is not accompanied by any such implementation rider. The court said in *Postal* that "*[s]uch provisions* are uniformly declared executory." 589 F.2d at 876-77 (emphasis added). It is obviously a very different matter to conclude that *a single provision* in a treaty requiring the parties to notify a depository of legislation they may enact renders *every provision* of the treaty executory. The *Gracey* court's paraphrase of *Postal* demonstrates its error. In holding that Article III of the Protocol rendered the entire Protocol non-self-executing, the *Gracey* court quoted *Postal* for the proposition that "treaties with '[s]uch provisions are uniformly declared executory.'" 600 F. Supp. at 1406. The words "treaties with" do not appear in *Postal*. The *Gracey* court thus fundamentally altered the statement it purported to be quoting.

III. ARTICLE 33 ESTABLISHES JUSTICIABLE OBLIGATIONS.

Dicta in this Court's more recent decisions suggest that a treaty may have to be implemented by legislation before it may be enforced in court even if the parties did not specifically agree that legislation would be required. In *Stevic*, this Court said that Article 34 of the Convention was not self-executing because its language was "precatory." 467 U.S. at 429 n.22. In *Head Money Cases*, this Court suggested that a treaty is not enforceable in court by individuals unless it "prescribe[s] a rule by which the rights of [individuals] may be determined." 112 U.S. 580, 598-99 (1884). These tests differ from that of *Foster* and *Percheman* in that they do not turn on an intent to require legislation. Instead, they reflect the view that certain rules are, under our system of separated powers, not for the courts to enforce.

Although the courts often describe a treaty that is unenforceable on these grounds as "non-self-executing," *see Stevic*, these grounds of unenforceability are not unique to treaties. A statute that is "precatory" is similarly unenforceable in court,[39] as is a statute that does not prescribe a rule by which the rights of the plaintiff may be determined.[40] A treaty that shares these characteristics is unenforceable in court for the familiar reason that courts exist, solely, to enforce the rights of individuals.[41] If a treaty or a statute does not impose a "duty" on the defendant, either because it is precatory or

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[39] Cf. *Pennhurst State Sch. & Hosp.* v. *Haldeman*, 451 U.S. 1, 24 (1981); *see generally* Vázquez, *supra*, at 1124.

[40] Cf. *Baker* v. *Carr*, 369 U.S. 186, 217 (1962) (lack of "judicially discoverable and manageable standards" reduces likelihood that legal provision will be enforceable in court).

[41] *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

because what it requires of the defendant is insufficiently spelled out, it does not give the plaintiff a correlative right.

Article 33 is clearly "self-executing" in this sense. Article 33's nonrefoulement obligation is not precatory but "mandatory." *Cardoza Fonseca*, 480 U.S. at 429. Nor can it be argued that Article 33 does not "prescribe a rule by which the rights of the private citizen or subject may be determined." *Head Money Cases*, 112 U.S. at 598-99. This Court had no difficulty discerning the content of Article 33's non-refoulement obligation in *Stevic*, and petitioners routinely enforce it with respect to refugees who have reached our shores.[42] Indeed, it is difficult to conceive of a situation in which an immediately effective, mandatory treaty obligation *not* to commit a well-defined act would require legislative implementation. As the court said in *Commonwealth v. Hawes*,[43] a decision that the author of *Head Money Cases* called "very able" in an opinion for

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[42] This Court's discussion in *Stevic* of Articles 33 and 34 of the Convention illustrates the correct application of this test for determining whether a treaty provision is self-executing, and confirms that Article 33 is self-executing. Article 34 provides in full as follows:

> The Contracting States shall *as far as possible* facilitate the assimilation and naturalization of refugees. They shall in particular *make every effort* to expedite naturalization proceedings and to reduce *as far as possible* the charges and costs of such proceedings." (Emphasis added.)

Because of its "precatory" language, its express contemplation of future affirmative acts, and its ambiguity concerning what is required, Article 34 is exactly the kind of treaty provision that has always been thought to be unenforceable in court without legislative fleshing out, and this Court accordingly so held in *Stevic*. 467 U.S. at 428-29 n.22. By contrast, because it imposes a clear, unambiguous and immediately effective obligation and establishes correlative rights of individuals, Article 33 exemplifies the type of provision that has consistently been considered self-executing.

[43] 76 Ky. (13 Bush) 697, 702-03 (1878).

the Court just two years later:[44]

> When it is provided by treaty that certain acts *shall not be done*, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land." (Emphasis added.)

When the obligation is prohibitory, unambiguous, and immediately effective, congressional "implementation" would simply repeat the prohibition and emphasize that "we mean it." The Supremacy Clause dispenses with the need for such embellishment.

IV. ARTICLE 33 NEED NOT CONFER A PRIVATE RIGHT OF ACTION.

Petitioners argued below that Article 33 was non-self-executing because it did not itself establish a private right of action. They argued that a treaty must be self-executing in this respect in order to be enforced by an individual in a court: "[A]n individual can enforce a treaty in court only to the extent that the treaty provides a directly enforceable private right of action." *Baker* Brief 24.

This argument is demonstrably wrong. Although a treaty that does not itself confer a right of action may be described as not

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[44] *United States* v. *Rauscher*, 119 U.S. 407, 428 (1886). *See also Restatement (Third) of the Foreign Relations of the United States* § 111.

"self-executing" in respect to remedies,[45] a treaty may be enforced by individuals in court even if it is not self-executing in this sense. If there is another source for the plaintiff's right of action, a treaty is enforceable in court as long as it establishes the defendant's obligation to behave in a given way towards the plaintiff – in other words, if it establishes the defendant's primary obligation and the plaintiff's correlative primary right.[46] As shown above, Article 33 plainly establishes the United States' obligation not to return refugees to a country in which they would be persecuted, and respondent's correlative right not to be returned. Respondents' right of action is conferred by the APA.

In numerous treaty cases, the right of action was conferred not by the treaty itself, but by the common law; the treaty merely established the defendant's duty (and the plaintiff's

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[45] *See* Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1112 (1991) (asking whether constitution may be said to be self-executing in regard to remedies). *See generally* Vázquez, *supra*, at 1117-1119.

[46] The distinction between a right and a right of action is a familiar, if often overlooked, one. This Court has held that, "[i]n deciding whether a federal right has been violated, we have considered [1] whether the provision in question creates obligations binding on the governmental unit or rather 'does no more than express a congressional preference for certain kinds of treatment.' [2] The interest the plaintiff asserts must not be 'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce.' [3] We have also asked whether the provision in question was 'intend[ed] to benefit' the putative plaintiff." *Dennis* v. *Higgins*, 111 S. Ct. 865, 871 (1991) (citations omitted). If there is a "right," the right of action may be conferred by, *inter alia*, 42 U.S.C. § 1983. *See id*. *See generally* Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 Colum. L. Rev. 233 (1991) (distinguishing between "primary rights" and "remedial rights"). Article 33 plainly confers a "right" on respondents under the *Dennis* criteria.

correlative right).[47] In other cases, the right of action was conferred by federal or state statute.[48] Respondents rely on the APA for their right of action. The APA provides a right of action for declaratory and injunctive relief to persons suffering "legal wrong" as a result of federal agency action. *See Japan Whaling Ass'n* v. *American Cetacean Soc.*, 478 U.S. 221, 231 n.4 (1986). Because Article 33 is the law of the land, agency action that violates that provision inflicts a "legal wrong" and entitles persons "adversely affected or aggrieved by [such] action" to judicial review thereof. 5 U.S.C. § 702 (1988).[49] Respondents fit comfortably within that class, as they are plainly within the "'zone of interests' sought to be protected" by Article 33. *See Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. 3177, 3186 (1990)(citation omitted).[50]

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[47] See *e.g. Florida* v. *Furman*, 180 U.S. 402 (1901) (action to remove cloud on legal title); *Botiller* v. *Dominguez*, 130 U.S. 238, 243 (1889) (ejectment); *Hauenstein* v. *Lynham*, 100 U.S. 483 (1879) (action "pursuant to a law of the State"); *Orr* v. *Hodgson*, 17 U.S. (4 Wheat.) 453, 462-63 (1819) (bill in equity); *Chirac* v. *Chirac*, 15 U.S. (2 Wheat.) 259, 277 (1817) (ejectment); *Harden* v. *Fisher*, 14 U.S. (1 Wheat.) 300, 303 (1816) (same); *Foster*, *supra* (same); *Ware*, *supra* (action in debt). *See generally* Vázquez, *supra*, at 1144 & nn.256-258.

[48] See *Chew Heong*, *supra* (habeas corpus action based on treaty provision); *Asakura* v. *Seattle*, 265 U.S. 332 (1924) (state action for injunction); *Jordan* v. *Tashiro*, 278 U.S. 123 (1928) (state mandamus action).

[49] The APA affords a right of action to challenge agency action that is unlawful because it violates a treaty. *See* Vázquez, *supra*, at 1147-48. Indeed, petitioners conceded in *Baker* that, "assuming that Article 33 imposes the obligations plaintiffs assert and were 'self-executing' in some broader sense, the current action for injunctive relief could . . . proceed as an APA action, and would therefore be subject to APA limitations." *Baker* Reply Brief 18 n.22.

[50] The self-execution decisions in which the court considered whether the treaty conferred a right of action were cases in which the plaintiff sought damages against private parties. *See*, *e.g.*, *Tel-Oren*, 726 F.2d at 775; *Mannington Mills Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1290 (3d Cir. 1979); *Dreyfus* v. *Von Finck*, 534 F.2d at 26; *Handel* v. *Artukovic*, 601 F. Supp. 1421. The APA thus did not supply a right of action, and the courts could discern no other basis for the right of action. Under such circumstances, it is appropriate for the court to consider whether the treaty confers the right of action. But the treaty need not confer a right of action if the plaintiff seeks declaratory or injunctive relief against federal officials. The right of action in such cases is furnished by the APA.

The APA right of action is unavailable if "statutes preclude judicial review" or if the challenged action is committed to agency discretion by law. 5 U.S.C. § 701 (1977 & Supp. 1992). Article 33 removes any discretion petitioners may have had to deliver refugees to their persecutors. Petitioners argue that the INA is a "statute preclud[ing] judicial review" under the APA. Respondents decisively rebut this argument in their brief, and we do not repeat their rebuttal here. We note, however, that petitioners' argument that the INA preempts respondents' APA right of action to enforce Article 33 is even weaker than their argument that the INA preempts respondents' APA right of action to enforce Section 243(h). Petitioners argue that respondents cannot avail themselves of Section 243(h) because statutes are presumed to apply only within our borders. But the same presumption against extraterritoriality would, if applied in this context, also defeat petitioners' argument that the INA takes away respondents' APA right of action to enforce Article 33. If the INA applies only within our borders and thus does not apply to this case, as petitioners argue, it cannot be a "statute [that] precludes judicial review" over this case. Thus, if Article 33 applies to respondents on the high seas, but the INA is territorially limited, as petitioners argue, respondents may maintain this action for an injunction under the APA.

CONCLUSION

For the foregoing reasons, the Lawyers Committee for Human Rights respectfully urges the Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GENE McNARY, Commissioner, Immigration and Naturalization Service, *et al.*,

Petitioners,

vs.

HAITIAN CENTERS COUNCIL, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF HUMAN RIGHTS WATCH, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. 92-344

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,

Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.4, Human Rights Watch hereby moves for leave to file the accompanying brief as an *amicus curiae* in support of the position of the respondents in this case. The parties' consent has been received.

Human Rights Watch is a nonpartisan, nongovernmental organization based in New York. It has submitted *amicus curiae* briefs to this and numerous other U.S. courts, and has substantial expertise on questions of international human rights law.

Through Americas Watch, one of its regional divisions, Human Rights Watch monitors and reports on civil and political rights conditions in Latin America and the Caribbean, including Haiti. Members of its staff regularly travel to Haiti to conduct interviews with victims and witnesses of human rights violations as well as to meet with government officials responsible for human rights matters.

Human Rights Watch believes that its detailed knowledge of human rights practices in Haiti and of related international human rights standards will assist this Court in determining whether Executive officials, consistent with international and domestic prohibitions of the forced return of refugees, may forcibly repatriate Haitian boat people who are interdicted on the high seas without screening to exempt those with well founded fears of persecution because of their political beliefs. Human Rights Watch thus seeks leave to file the accompanying *amicus curiae* brief.

Dated: New York, New York
December 21, 1992

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF *AMICUS CURIAE* HUMAN RIGHTS WATCH

Human Rights Watch submits this brief as *amicus curiae* urging affirmance of the order of the U.S. Court of Appeals for the Second Circuit.

INTEREST OF *AMICUS CURIAE*

Human Rights Watch is a nonpartisan, nongovernmental organization based in New York. The largest U.S.-based international human rights organization, it is composed of five

regional divisions: Africa Watch, Americas Watch, Asia Watch, Helsinki Watch and Middle East Watch, as well as the Fund for Free Expression and various special projects. Human Rights Watch monitors violations of civil and political rights worldwide, including summary executions, torture, imprisonment for nonviolent speech or association, violations of due process, and mistreatment of refugees. Its reports on human rights conditions regularly receive significant attention by the State Department, Congress, the United Nations, the Organization of American States, and the press. By documenting and exposing human rights violations, Human Rights Watch seeks to end abusive practices.

Americas Watch is the division of Human Rights Watch that monitors and reports on human rights conditions in Latin America and the Caribbean. Members of the staff have conducted repeated investigative missions to virtually every country in the hemisphere, including multiple visits to Haiti since the September 30, 1991 military coup and for a number of years before that coup.

Human Rights Watch has appeared as counsel before U.S. courts and both the Inter-American Court and the Inter-American Commission on Human Rights in actions that have raised questions of international human rights law. It has also submitted *amicus curiae* briefs to this and numerous other U.S. courts. Human Rights Watch believes that its extensive knowledge of human rights practices in Haiti and of related international human rights standards will assist this Court in determining whether Executive branch officials may, consistent with international and domestic prohibitions of the forced return of refugees, forcibly repatriate Haitian boat people who are interdicted on the high seas without any screening to exempt from repatriation those with well founded fears of persecution because of their political beliefs.

Statement of the Case

Human Rights Watch relies principally on the statement of facts contained in the respondents' brief. However, certain additional facts are pertinent to the arguments presented in this brief.

On January 30, 1992, the U.S. State Department announced that the U.S. Embassy in Port-au-Prince would establish an in-country refugee processing program. The purpose of the program was "to reach those individuals . . . who [had] valid claims to refugee status" and to urge them "not to put out to sea."[1] Because the program came at a time of pervasive violent persecution of individuals suspected of sympathy for ousted President Jean-Bertrand Aristide or opposition to military rule,[2] many Haitians did not feel confident remaining in the country to seek refugee status. While some 23,000 Haitians fled to the neighboring Dominican Republic,[3] others were discouraged from doing so by the Dominican government's longstanding practice of forcibly recruiting Haitians to cut sugarcane on its plantations.[4] Large numbers of Haitians thus continued to take to sea, as they had done since early November 1991.

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1. Refugee Admissions to the United States for 1993, 138 Cong. Rec. S15,274, S15,278 (daily ed. Sept. 25, 1992).

2. *See* Americas Watch, National Coalition for Haitian Refugees ("NCHR"), Physicians for Human Rights, *Return to the Darkest Days: Human Rights in Haiti Since the Coup* (Dec. 1991).

3. U.S. Committee for Refugees, *Stone of Refuge: Haitian Refugees in the Dominican Republic* 2 (June 1992); Richard Epstein, *Haiti's neighbor acts tough*, San Francisco Chronicle, June 9, 1992; Wendy S. Tai, *Haitian policy signals U.S. shift on refugees*, Minneapolis Star Tribune, June 22, 1992.

4. *See, e.g.*, the following reports by Americas Watch and NCHR: *A Troubled Year: Haitians in the Dominican Republic* (Oct. 1992); *Half Measures: Reform, Forced Labor and the Dominican Sugar Industry* (March 1991); *Harvesting Oppression: Forced Haitian Labor in the Dominican Sugar Industry* (June 1990); *Haitian Sugar Cane Cutters in the Dominican Republic* (Nov. 1989).

On May 24, 1992, President George Bush responded to the continuing exodus by signing Executive Order No. 12,807, which authorized the summary forcible repatriation of all Haitians interdicted beyond the territorial waters of the United States; the prior practice of screening for and exempting those with credible claims of asylum was ended.[5] The White House sought to cushion the effect of its actions by noting that Haitians who feared persecution could "avail themselves of refugee processing in Haiti."[6] Indeed, given the dangers to Haitians of traveling to the Dominican Republic and the poverty that precluded travel elsewhere by air, in-country processing became the sole avenue to refugee status for most Haitians once flight by sea was precluded. Yet, as shown below, the refugee-processing program that has been established in Haiti provides no reasonable guarantee against persecution, either for those who remain in Haiti or for those who are forced back.

The Administration also justified its new policy of forced summary repatriation by citing a survey of Haitians who had been repatriated earlier. Conducted by personnel from the State Department and the Immigration and Naturalization Service (INS) based in the U.S. Embassy in Port-au-Prince, the survey purports to show that repatriated Haitians face no risk of persecution. As State Department spokesman Richard Boucher explained at a press briefing on May 26:

> We also continue our efforts to monitor the welfare of repatriated Haitians. The de facto authorities in Haiti have made a commitment not to harm these people. And we're out checking on it. Our Embassy officers have contacted over 2,000 repatriated Haitians in the capital, and in the countryside, both through spot checks and by following up specific allegations of mistreatment. In no

5. 57 Fed. Reg. 23,133 (1992).

6. 138 Cong. Rec. S15,274, S15,278 (daily ed. Sept. 25, 1992).

> case have they found evidence of mistreatment connected to their repatriation.[7]

As shown below, whether by design or negligence, the State Department-INS survey was so deeply flawed that it demonstrated little, if anything, about the fate of Haitians who are returned forcibly and summarily pursuant to the May 24 Executive Order.

Summary of Argument

While denying that either the international prohibition of *refoulement* or its domestic codification extends to the conduct of U.S. officials on the high seas, the Bush administration has advanced two arguments to suggest that summary forcible repatriation does not constitute *refoulement* even if the prohibition has an extraterritorial reach. First, it contends that the program established to evaluate the claims of would-be refugees within Haiti provides adequate protection against persecution of summarily repatriated Haitians. Second, it contends that its survey of repatriated Haitians proves that they face no danger of persecution. Both of these arguments are groundless.

In-country processing in Haiti does not prevent persecution of summarily repatriated boat people. Many would-be refugees are deterred from applying for refugee status by the real and perceived dangers associated with both the military checkpoints that must be crossed on the way to Port-au-Prince and a notoriously abusive police facility that is located only two blocks from the processing center. In addition, the months of waiting before an interview is scheduled, an application is processed, and post-adjudication processing is completed leave even those who do apply for refugee status in dangerous limbo while the arduously slow process runs its course. Moreover,

7. *See also* State Department spokeswoman Margaret Tutwiler, press briefing (Feb. 3, 1992); State Department spokesman Richard Boucher, press briefings (Feb. 14 & 18, 1992).

many applicants are unfairly denied refugee status because of the unjustified insistence on written preliminary applications in a largely illiterate country, an unreasonable demand for documentary evidence of persecution, and an inappropriate interpretation of the well-founded-fear-of-persecution standard to require prior personal experience of persecution.

The survey of repatriated Haitians conducted by U.S. officials based in the U.S. Embassy in Haiti is no more persuasive in demonstrating that repatriated Haitians do not face persecution or in rebutting extensive evidence collected by Human Rights Watch showing widespread violent repression to which repatriates have fallen victim. First, it is unclear whether the claim that no evidence of mistreatment was found "connected to their repatriation" refers only to persecution because of the fact of repatriation (a tiny subset of the possible bases for a refugee claim) or persecution because of political opinion (the correct refugee standard). Second, even if broader forms of political persecution were examined, the sample was artificially skewed. The majority of the participants in the survey were interviewed at a time when roughly 30 percent of the boat people -- presumably those with the strongest claims of persecution -- were being screened into the United States from Guantánamo; the survey thus says relatively little about the risks now faced when all boat people are repatriated. Third, the interviews were frequently conducted in public settings where many of those most at risk of persecution would not dare venture, and where even those who had faced persecution would be reluctant to speak candidly. As Human Rights Watch's extensive field research has shown, many Haitian boat people have been arrested, imprisoned and otherwise persecuted since their return to Haiti, the government's claims notwithstanding.

Argument

I. IN-COUNTRY PROCESSING AS IMPLEMENTED IN HAITI DOES NOT ENSURE THAT SUMMARILY REPATRIATED BOAT PEOPLE AVOID PERSECUTION

To justify the summary forcible repatriation of Haitian boat people, the Bush Administration has pointed in part to its program for in-country processing of would-be refugees. Given the difficulties inherent in any in-country processing program, Human Rights Watch doubts that one can ever be fashioned to ensure that forcibly repatriated refugees do not encounter renewed persecution. At minimum, such a program would have to identify all repatriates who have a well founded fear of persecution and protect them from persecution until they are sent safely abroad -- a standard that is appropriate because while would-be refugees have no right to be admitted to any particular country, they have a right not to be summarily and forcibly repatriated unless their freedom from persecution can be guaranteed. The in-country processing program as implemented in Haiti wholly fails to provide such a guarantee.

A. Congress Never Intended In-Country Refugee Processing To Be the Sole Means of Escaping Persecution

The Refugee Act of 1980[8] ("Refugee Act") protects not only those fleeing persecution who are outside their country -- refugees as defined by international law -- but also certain would-be refugees who remain in their country. Yet this new form of protection was never meant to supplant traditional refugee guarantees.

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8. Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

One of the primary objectives of the Refugee Act was to bring the United States into compliance with the 1967 United Nations Protocol Relating to the Status of Refugees ("U.N. Protocol"),[9] which the United States had ratified in 1968, and with the United Nations Convention Relating to the Status of Refugees,[10] which is incorporated by reference into the U.N. Protocol.[11] The Refugee Act adopted the definition of "refugee" contained in the U.N. Protocol.[12] Similarly, Congress made compliance with the prohibition of *refoulement* (contained in Article 33.1 of the U.N. Protocol[13]) mandatory rather than discretionary. *INS v. Stevic*, 467 U.S. 407, 422 (1984); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987).

In one respect the Refugee Act was more generous than international practice. While the U.N. Protocol recognizes as refugees only those individuals who are outside their country of origin, Congress allowed the President, after appropriate consultation, to include people who remain within their home country. 8 U.S.C. § 1101(a)(42)(B). Congress's purpose was to maintain "flexibility to deal with crises such as the evacuation of Vietnam in 1975 and to respond as well to situations in countries such as Cuba or Chile . . . where there are political

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9. Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

10. July 28, 1951, 189 U.N.T.S. 150.

11. *See* H.R. Conf. Rep. No. 781, 96th Cong., 2d Sess. 2, 19, *reprinted in* 1980 U.S.C.C.A.N. 160; S. Rep. No. 256, 96th Cong. 2d Sess. 4, 9, *reprinted in* 1980 U.S.C.C.A.N. 144, 149.

12. 8 U.S.C. § 1101(a)(42)(A) substantially adopts the definition of refugee in Art. I.2 of the U.N. Protocol.

13. The prohibition reads in pertinent part: "No Contracting State shall expel or return (*"refouler"*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his . . . political opinion."

detainees or prisoners of conscience . . . ."[14] To protect people facing persecution who are trapped in their own country and thus unable to apply for refugee status from a third country, Congress authorized in-country refugee processing. However, by recognizing the possibility of individuals applying for refugee status from within their home countries, Congress intended to provide an additional avenue of protection, not to authorize a means of precluding traditional avenues for protecting refugees who have managed to leave their country.[15]

Since the passage of the Refugee Act, in-country processing, sometimes called an Orderly Departure Program, has been instituted in only four countries -- Vietnam, the former Soviet Union, Cuba and Romania. In none of these countries did Congress or the Executive intend in-country processing to be the sole means of escape for would-be refugees,[16] or a justification for thwarting other means of flight. To the contrary, the U.S. government, including the Bush Administration, has harshly criticized countries that have forcibly repatriated

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14. 126 Cong. Rec. 4499 (1980) (statement of Rep. Holtzman).

15. *See* 126 Cong. Rec. 4499 (1980) (statement of Rep. Holtzman); Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 39-40, 46-47 (1981); Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 82 (statement of Leonard F. Chapman, INS Commissioner).

16. At a June 11, 1992 hearing before the House Subcommittees on International Operations and Western Hemisphere Affairs, Rep. Solarz commented: "In the Soviet Union, Cuba, Vietnam, and Romania, in-country processing has been an alternative option for those with the inclination, courage and gumption to use it. But it has never been the exclusive option, and it is clear that making it the exclusive option does not conform to international law." *Congress, Courts React to Presidential Order Turning Back Haitian Boat People*, Refugee Rep., June 19, 1992, at 11, 14.

Vietnamese asylum seekers,[17] even though in-country refugee processing has existed almost continuously in Vietnam since 1980.[18]

B. As the Sole Means of Refugee Adjudication for Most Haitians, In-Country Processing in Haiti Provides, at Best, Limited and Inadequate Protection

Quite apart from Congress's intent, refugee processing as implemented in Haiti does not begin to guarantee that repatriated boat people can avoid persecution. The dangers inherent in passing through pervasive military roadblocks on the way to Port-au-Prince, as well as the perceived risk of being in the vicinity of one of Haiti's most notorious detention and torture centers (described below), which is only two blocks from the processing facility, deter many who are at risk of persecution from even applying for refugee status. The lack of protection during the lengthy delays while refugee claims are processed compounds the dangers facing would-be refugees. And unjustifiably stringent adjudication procedures leave many legitimate refugees unprotected.

17. *See, e.g.*, Statement of State Department Spokesman Richard Boucher, June 5, 1991 ("We oppose involuntary return to Vietnam under current conditions there."); Barbara Basler, *Vietnamese Resist Repatriation Plan*, The New York Times, October 19, 1991 (quoting Assistant Secretary of State for East Asian and Pacific Affairs Richard Solomon: "We are opposed to the forced repatriation of people from Hong Kong to Vietnam, particularly given the current circumstances in that country.").

18. Since 1979, in-country processing in Vietnam has been suspended only between January 1, 1986 and September 1987. Orderly Departure Program Hearing, 101st Cong., 1st Sess. 7-8 (1989) (statement of Robert Funseth, Dep. Asst. Secretary, Bur. of Refugee Aff., Department of State).

1. The Dangers Inherent in the Procedure for Processing Refugee Claims in Haiti Deter Many Would-be Refugees From Applying

Between February and October 1, 1992, processing of refugee applications took place in the U.S. Consulate and the U.S. Embassy in Port-au-Prince. Both of these compounds are seen by many Haitians as "forbidding, potentially dangerous places for Haitians."[19] They are in exposed areas of downtown Port-au-Prince, near Haitian government buildings, and are heavily guarded and surrounded by high walls. Many Haitians did not "dare risk a visit for the slim chance at refugee status."[20] Haitians wishing to apply for refugee status had to stand in line outside the Consulate for several hours to receive information about the application process, and to return several times for interviews with consular staff and INS adjudicators. The delays and possibilities for exposure were strong deterrents to the many victims of political persecution who were hiding from the Haitian army.[21]

Despite some initial equivocation on the point, U.S. officials in Port-au-Prince conceded to Human Rights Watch that would-be refugees who were afraid personally to visit the Embassy or Consulate had no other reliable avenue for pursuing their claims. On June 11, 1992, then U.S. Ambassador to Haiti Alvin Adams told Human Rights Watch that Embassy staff gladly leave the compound to interview people who want to apply for refugee status but are afraid to enter the facility. On June 14, however, consular officer Kyle Boyce qualified this statement, explaining to Human Rights Watch that first the potential refugee applicant must call or write the Embassy to explain why he or she fears applying in person. Within three

19. Joint Appendix ("J.A.") 420-23, Plaintiffs' Exhibit ("P.E.") 86, May 11, 1992.

20. *Id.*

21. J.A. 425-27, P.E. 87, May 26, 1992.

weeks, even this position seemed to have been abandoned. On July 6, consular officer Dennis Hankins admitted to Human Rights Watch that the staff will not leave the Embassy to interview potential refugee applicants who are afraid to come to it. Instead, he said, refugee claimants are allowed to "drive their cars right inside the Consulate compound" -- a meaningless, even cynical, alternative for most Haitians whose dire poverty precludes them from owning a car or knowing anyone who does.

Since October 1, 1992, the processing of refugee applications in Haiti has been moved out of the Consulate to a new processing center that has been set up in the Banque Nationale de Paris (BNP) building on the corner of Rue John Brown and Rue Lamarre. While the commercial setting provides some added degree of anonymity for refugee applicants, it remains an intimidating site. Located about a mile from the Consulate, the BNP building is in downtown Port-au-Prince within two blocks of the headquarters of the Investigations and Anti-Gang Service of the Port-au-Prince Police -- a site long associated with torture and gruesome mistreatment of perceived political opponents.[22]

Visiting the refugee processing program is also not a viable option for the vast majority of Haitians who live outside the capital. To enter Port-au-Prince from the countryside, one must pass through numerous military roadblocks that line the handful of routes.[23] Few would-be refugees who are being sought by the army would risk detection at these roadblocks. Moreover, many Haitians simply cannot afford bus fare to the

22. *See* Americas Watch, NCHR, Caribbean Rights, International Commission of Jurists ("ICJ"), *Reverting to Despotism: Human Rights in Haiti* 15-16, 23-24, 58-59 (March 1990); Americas Watch, NCHR and Caribbean Rights, *The More Things Change...Human Rights in Haiti*, 65-70 (Feb. 1989).

23. *See* J.A. 420-23, P.E. 86, May 26, 1992. Even foreigners are not immune: Americas Watch researchers have been searched at military roadblocks on several occasions while conducting investigations in Haiti since the coup.

capital, let alone the expense of supporting themselves in Port-au-Prince while their refugee applications are being processed. These obstacles preclude large numbers of Haitians from pursuing refugee claims.

2. Many Haitians Are Unable To Follow Application Procedures

A Haitian wishing to apply for refugee status must complete a four-page questionnaire written in French and Creole. Although three-fourths of all Haitians cannot read or write, would-be refugees are not automatically given assistance in completing this critical questionnaire. From February until June 1992, consular staff helped refugee applicants to fill out the questionnaire on a walk-in basis. The Consulate ended this practice when refugees began to flood the Consulate in June. Thereafter, applicants who sought assistance in completing the questionnaires were given appointments. This practice, too, was discontinued in July.[24] Since October 1, the International Organization for Migration (IOM), the intergovernmental voluntary agency designated by the State Department to assist with refugee processing, will assist Haitians in completing the questionnaire if the applicant knows enough to ask for help.[25] About 50 percent of the applicants receive such assistance.[26] An IOM spokeswoman admitted that many Haitian applicants might have a problem understanding the questionnaire because of their limited reading and writing ability.[27]

24. Telephone interview with Kenneth Foster, a program officer with U.S. State Department Bureau for Refugee Programs ("Foster Interview") (Dec. 16, 1992); Telephone interview with Francis Sullivan, International Organization for Migration Chief of Mission, Washington, D.C. ("Sullivan Interview") (Dec. 17, 1992).

25. Sullivan Interview (Dec. 18, 1992).

26. *Id.*

27. Sullivan Interview (Dec. 3, 1992).

3. Haitians Are Not Receiving Fair, Consistent, or Timely Review of their Claims

In addition, in-country applicants are not receiving timely review of their claims. Between February 1992, when the in-country processing program began, and November 27, some 4,700 applicants had completed preliminary questionnaires and returned them to the Consulate.[28] Of these, only 2,200 cases had been adjudicated by the INS.[29] The remaining 2,500 cases will take an estimated 40 weeks to adjudicate if no new cases come in, and an estimated 100 weeks at the current rate of new cases.[30]

In light of this substantial backlog, the Consulate has attempted to prioritize applications. The refugee coordinator, Dennis Hankins, reviews the preliminary questionnaires and categorizes, or "vets," the applicants as "A," "B" or "C" on the basis of their likelihood of acceptance as refugees.[31] "A"

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28. Would-be refugees often submit applications that include children or spouses. The 4,700 applications concern some 6,800 individuals.

29. These statistics are drawn from a State Department fact sheet, Statistics on Haiti In-Country Refugee Program Through November 27, 1992.

30. The INS adjudicated 252 cases in November 1992, or about 63 cases per week. Foster Interview (Dec. 16, 1992). Forty to sixty new cases continue to come in each week. Telephone interview with Dennis Hankins, refugee coordinator at the U.S. Consulate in Port-au-Prince ("Hankins Interview") (Dec. 10, 1992).

31. When asked about the standards that he uses in making his decisions, Hankins said that there are "no set criteria." Hankins Interview (Dec. 10, 1992). Kenneth Foster, the State Department program officer, said that "the guidelines are clear." An "A" applicant includes "likely target[s] of persecution," such as "former members of the Aristide government, former political prisoners, persons in lead positions in local or national community or religious organizations" or persons "in prominent fields likely to be persecuted." An "A" applicant is someone who tells a "credible story that [he or she] has been individually targeted and has a well founded fear of individual persecution." A "B" applicant is "less specific" and makes "no claim of individual persecution."
(continued...)

applicants are moved to the top of the list for an interview with IOM staff.

Hankins told Human Rights Watch that he did not know how long a person at each of the three priority levels must wait for the first interview with the IOM or for the eventual INS adjudication.[32] The "best case scenario," he said, would be for consular staff within several days of receiving the preliminary questionnaire to contact the person by phone to schedule an interview. If the person has no phone (the norm in Haiti) the Consulate will send out a notice of an interview time by mail -- usually for two to three weeks later.[33] More often, according to the IOM, "a couple of months" are required for even an "A" applicant's case to be scheduled for the initial case presentation at the IOM office. "B" applications -- the majority of those received -- are processed even more slowly, and none of the "C" applications has yet been interviewed.[34]

These delays are extremely troubling given that the in-country processing program, if it is even to begin to justify summary forcible repatriation, must at minimum ensure that repatriates do not face political persecution. A Haitian fleeing threatened detention, beating or execution by the army could easily face a delay of a month or more (likely much more) under the best of circumstances while his application is processed. Moreover, given the difficulty that many Haitians will have understanding and completing the preliminary questionnaire, there is a substantial risk that an individual will

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31.(...continued)
A "C" applicant is someone who is clearly "not a target of persecution." Foster Interview (Dec. 16, 1992).

32. Hankins Interview (Dec. 10, 1992).

33. *Id.*

34. Sullivan Interview (Dec. 3, 1992). The 885 "C" applications, as of November 27, have been "put on the back burner." *Id.*

be wrongly classified a "C" applicant and thus face indefinite delays before his or her application is considered.

After the IOM interview, an applicant's file is forwarded to INS staff in the refugee processing center for adjudication, which usually takes place within a week. The applicant then must reappear at the refugee processing center to pick up the INS's decision, which may be ready as quickly as two days or as long as two weeks later.[35] Even if granted refugee status, an applicant ordinarily must wait some additional two months for post-adjudication processing, including medical clearance and an assurance of sponsorship by a voluntary agency in the United States.[36] At times, it may take up to four or five months before a person granted refugee status is able to leave Haiti. Human Rights Watch is aware of at least two Haitians approved as refugees in July 1992 and one approved in mid-August who were still being processed in Haiti as of December 15.

Another troubling aspect of the in-country processing program is the inconsistency and quality of INS adjudications. Since October 1, three temporary-duty INS adjudicators from the United States have averaged some six interviews a day per officer during their 30-day rotations in Haiti.[37] While an INS spokeswoman told Human Rights Watch that an attempt has been made to find adjudicators with asylum training, they come from a "variety of positions," ranging from criminal investigators to deportation officers, and none has had any prior experience

35. Telephone interview with Kathleen Thompson, senior refugee officer for the INS Office of Refugees, Asylum and Parole ("Thompson Interview") (Dec. 17, 1992). According to Thompson, "special arrangements" can be made to mail decisions to persons living outside of Port-au-Prince. *Id.*

36. Foster Interview (Dec. 16, 1992).

37. Thompson Interview (Dec. 8, 1992).

working in Haiti.[38] As might be expected from officers whose mission in the United States is law enforcement rather than refugee protection, the interviews in some cases are extremely adversarial and unfriendly.[39] In contrast to the officers in the INS asylum unit, who receive voluminous information on country-specific human rights conditions and extensive training on issues of cross-cultural sensitivity, the immigration enforcement officers currently adjudicating claims in Haiti have only a short time to familiarize themselves with the morass of political and popular organizations with which the would-be refugees may be affiliated.[40]

4. The In-Country Processing Program in Haiti Is Impermissibly Stringent in Both the Substantive Standard Applied and the Nature of Proof Required

The in-country processing program employs such a high substantive standard and requires such extensive documentary proof that unjustifiably few would-be refugees qualify. Of the 2,282 cases that were adjudicated between the program's debut in February and December 4, only 131 applicants and their families were conditionally accepted as refugees -- an approval rate of less than 6 percent.[41] By contrast, at Guantánamo

38. Thompson Interview (Dec. 17, 1992).

39. J.A. 420-23, P.E. 86, May 26, 1992. *See* INS, Worldwide Guidelines for Overseas Refugee Processing (Aug. 1983) ("The atmosphere of the interview should not be adversarial. It should be conducted so as to gather information to achieve an equitable decision."); U.N. High Comm'r for Refugees, Handbook on Procedures and Criteria for Determining Status (1979) ("U.N. Handbook") at 48 (examiner must create a "climate of confidence").

40. The INS is seeking applicants to begin one-year positions in Port-au-Prince beginning in March 1993, so that the staff will be "more consistent" than under the present system of rotating adjudicators. Thompson Interview (Dec. 8, 1992).

41. Hankins Interview (Dec. 10, 1992).

10,700 of 36,000 Haitians were found to have "credible claims" of persecution, allowing them to pursue asylum claims in the United States -- an initial approval rate of close to 30 percent.[42]

The Consulate's dangerously stringent evidentiary requirements is illustrated by the case of one applicant for refugee status, Carl Henri Richardson.[43] In the fall of 1990, Richardson, 36, a resident of Jean Rabel in northwestern Haiti, had helped to found a local committee for Lavalas and the National Front for Change and Democracy (FNCD) -- the political movements through which Father Aristide ran for president. After Aristide's election, Richardson was appointed municipal registrar (*officier de l'etat civil*) -- a post in which he continued after the miliary coup of September 30, 1991. On November 11, 1991, Richardson was arrested in front of his office and held for 13 days in prisons in Jean Rabel and the provincial capital of Port-de-Paix. While in custody, he was forced to watch soldiers viciously stomp on five suspected members of the Tèt Kole movement, a peasants association long associated with opposition to military rule.

In June 1992, after months in hiding because of continuing attacks on his family and property, Richardson heard on the Voice of America that people facing persecution could apply for refugee status at the U.S. Consulate. On June 19, after waiting for more than two hours on the street in front of the Consulate, he was admitted to the compound and granted a brief initial interview. The consular officer who interviewed him

42. *See* J.A. 429-32, P.E. 88, May 6, 1992. One factor in the different approval rates was the relative dangers involved in seeking refugee status. While those most at risk of persecution may be unwilling or unable to risk encountering the military roadblocks on the way to Port-au-Prince or the abusive police in the vicinity of the processing center, those heading for Guantánamo could more easily evade these threats by leaving from numerous possible sites along Haiti's extended coastline. The placement of Coast Guard cutters just over the horizon also minimized the risk of taking to sea in small, overcrowded boats.

43. This account is taken from an interview with Richardson on July 20, 1992.

said that to obtain refugee status Richardson needed documentary evidence to prove that he had been imprisoned.

As a result, Richardson returned to northwestern Haiti to seek such proof. On July 8, while he waited for a letter from a local justice of the peace verifying his imprisonment, soldiers arrested him for a second time, took him to the military post at Môle Saint Nicolas, ripped out one of his toenails, and beat him for three hours on his head, shins, buttocks and feet, until he lost consciousness, blood ran from both ears, and he could no longer see out of his right eye. He remained jailed for a week.

After interviewing Richardson in late July, Human Rights Watch contacted the U.S. Consulate. Only then did an official say that he was "very interested" in speaking with Richardson, and arranged an interview the next morning. Although Richardson was granted refugee status in mid-August 1992, the Consulate's prior insistence on documentary proof of persecution cut against the INS's own guidelines, which state that "[t]he bona fide refugee is not likely to have in his possession conclusive evidence of his past persecution or his fear of persecution," and that the applicant's burden of proof "may be established by his statements to the extent that they are consistent and credible . . . ."[44]

Judging by the decisions rendered so far, the substantive standard employed by the Consulate also appears to be wrong. The INS's Worldwide Guidelines for Overseas Refugee Processing (Aug. 1983) make clear that a personal experience of persecution is not required to demonstrate a well founded fear of persecution:

44. INS, *Worldwide Guidelines for Overseas Refugee Processing* (Aug. 1983). *See also* U.N. Handbook at 47 ("Often . . . an applicant may not be able to support his statement by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule.")

> An applicant who falls within a group widely accepted as having suffered persecution (e.g., members of the former military) should be considered a refugee even though he may have personally escaped persecution, either through concealment or luck. Requiring an individual showing is contrary to the law; all that he need show is a reasonable fear of persecution. Evidence of persecution against a group to show likelihood of persecution against an individual is a proper and correct implementation of case-by-case processing.
>
> Refugee status may be based upon persecution suffered in the past *or* upon the likelihood of future persecution. The presence of either condition is sufficient; the presence of both conditions is not required. (Emphasis in original.)

However, Human Rights Watch's field research has shown that the refugee processing in Haiti apparently requires refugee applicants to demonstrate that they already have experienced arrest or physical mistreatment, rather than that they have a well founded fear that they might face persecution. Those who seek to establish a well founded fear of persecution only on the basis of their association with groups that have been persecuted are routinely turned down.

Four cases followed closely by Human Rights Watch because of the strength of their claims -- two that were provisionally accepted and two that were rejected -- demonstrate this pattern. One of those accepted, Octalouis Desnoyer, had been a member of a popular organization (much despised by the military) known as KOMILFO and had been an activist for Aristide's FNCD party in the 1990 elections. He had spent six months in prison where he was repeatedly beaten and tortured.[45] The other, Jean Guilnord Telisma, had been followed and threatened after the coup by soldiers of two Port-

45. Interview with Octalouis Desnoyer (June 19, 1992).

au-Prince-based military/police units, apparently for having worked as a personal security guard for Aristide's Minister of Information following a decade of activism with the popular church.[46]

The claims of the two rejected candidates were at least as compelling as that of Telisma, the second man accepted. One had been employed by the Aristide government as a messenger in the Ministry of Foreign Affairs after having worked for years with Aristide at his church of St. Jean Bosco in the Port-au-Prince slums. The man, whose name is omitted for his protection, had a photograph of himself with Aristide at the church, and other documents to prove his employment by the Aristide government and his leadership position in a progressive youth organization in Port-au-Prince.[47] The other rejected applicant, who also asked that his name not be revealed, was a soldier who had deserted his post on October 3, 1991 because he feared persecution as an Aristide supporter. He had ample documentation of his position in the military. In addition, in early June 1992, his home in the northern town of Lhomonde was searched by six armed and uniformed soldiers. Although the man was not at home at the time, his mother was so frightened by the soldiers' aggressive questioning about her son's whereabouts that she fainted.[48]

The case of the Haitian army deserter also illustrates the procedural difficulties inherent in pursuing in-country processing for those who fear persecution. Human Rights Watch interviewed the former soldier in Port-au-Prince in June 1992, at a time when he was in hiding. Because of the serious threat to his safety and his lack of money or a place to stay in Port-au-Prince, Human Rights Watch tried to arrange an immediate meeting for him at the U.S. Consulate. Consular official Dennis

46. Interview with Jean Guilnord Telisma (June 19, 1992).

47. Interview with the unidentified man (June 1992).

48. Interviews with the unidentified man (June & July 1992).

Hankins said by telephone that the Consulate could not see him without Human Rights Watch first writing a letter of support to obtain an appointment. Ultimately, after considerable insistence, the man was allowed to fill out a refugee questionnaire, and that afternoon received a date for an INS interview. In the meantime, he was compelled for his safety to return to hiding. His refugee application was rejected on July 24, 1992.

The Consulate's rejection of applicants such as this soldier reflects an apparent standard for accepting refugees that requires not a well founded fear of political persecution but a personal experience of persecution. In the majority of cases with which we are familiar, those accepted as refugees have already suffered imprisonment, beatings, torture or other direct persecution, while those who lack this history of personal persecution are rejected, even if their reasons for fearing persecution are compelling. This and the other shortcomings noted above demonstrate that in-country processing cannot prevent forcibly repatriated boat people from encountering persecution upon their return to Haiti, in violation of the international and domestic prohibition of *refoulement*.

II. CONTRARY TO THE PURPORTED SHOWING OF THE GOVERNMENT'S SURVEY, REPATRIATED HAITIANS FACE SERIOUS POLITICAL PERSECUTION

The Bush Administration has also sought to justify forcible summary repatriation of Haitian boat people by pointing to a survey it conducted of some 3,000 repatriates. However, whether by design or negligence, the survey was deeply flawed and cannot begin to account for the level of persecution faced by forcibly returned Haitians. Human Rights Watch's extensive field work in Haiti has shown not only that the Haitian army continues to detain, beat and kill perceived opponents of military rule, but also that repatriated Haitians have encountered such persecution.

A. Extensive Field Research of Human Rights Conditions in Haiti Reveals Systematic Persecution of Perceived Military Opponents

In addition to numerous earlier investigations, Human Rights Watch conducted a fact-finding mission to Haiti between June 5 and July 30, 1992, during the first two months of the summary repatriation program. Bilingual Creole and English-speaking researchers traveled to eight of Haiti's nine departments, including some of the country's least accessible regions, to interview some 250 people, including members of human rights organizations, representatives of international aid and development organizations, and victims of human rights abuses. In numerous cases, Human Rights Watch researchers were forced to conduct interviews secretly, to avoid putting their sources at risk of retaliation from local military officials who have banned meetings of any sort within their territory. The majority of the informants asked that their names not be revealed out of fear of reprisal.

Contrary to the Bush administration's claims, Human Rights Watch found a pattern of widespread and severe repression of individuals affiliated with any group that is viewed by the Haitian military as opposed to its continuing rule. Seeking to avoid the kind of popular unrest that has brought down past military regimes, the army -- from the generals heading the governing junta to the section chiefs wreaking havoc in the most remote country hamlets -- has attempted to eviscerate all civic, popular and professional organizations that are seen not to accept either the overthrow of President Aristide or the installation of military government. Leaders of grass-roots organizations that assist Haiti's poor, students, teachers, journalists, lawyers, trade unionists, and religious workers have been hunted down and arrested, beaten or killed by soldiers and section chiefs. Individuals found distributing pro-Aristide materials have also been severely treated. Short-term detention is widely used to intimidate and subdue. Almost all arrests are warrantless. Beatings during detention are the rule rather than the exception. And to this day, some perceived

political opponents continue to face execution and forced disappearance."[49]

B. Repatriated Boat People Are Among Those Who Continue to Face Persecution in Haiti

Claims by the Bush Administration notwithstanding, Human Rights Watch has found that Haitian boat people have been arrested, imprisoned or otherwise persecuted after being returned to Haiti. Commonly, repatriates are questioned about their reasons for leaving the country. Many "double-backers" -- Haitians who set to sea a second time after being forcibly returned by the Coast Guard -- have reported retaliation by Haitian authorities after their return to Haiti. INS officials in Guantánamo found many of these accounts persuasive and admitted the Haitians to the United States on their second pass through Guantánamo. In October and November 1992, whole boatloads of returned refugees have been detained by the Haitian police for questioning after U.S. Coast Guard cutters deposited them on the docks in Port-au-Prince. Some have been held overnight in police lockups and others jailed for longer periods. Selected repatriates continue to be finger-printed and occasionally photographed.[50]

The following are a few of the many cases investigated by Human Rights Watch:

- On May 16, Luckner Jean, a 38-year-old repatriate from Fort Royal, was seized by a soldier in Petit Goâve who kicked and punched him and demanded information: "Where are your friends who came back with you from Guantánamo?" The soldier took Jean to the local army

49. Results of our research are contained in a report scheduled for publication in January 1993, and can be found in abbreviated form in the chapter on Haiti in the Human Rights Watch World Report (Dec. 1992).

50. Telephone interview with Nancy Jackson, desk officer for Haiti, State Department Bureau of Inter-American Affairs (Dec. 17, 1992).

post where he was hit with a truncheon and cables, which lacerated his back. He was released the same day and, with his wounds not yet healed, he fled the country by boat again the following day.

- On August 14, 154 people were arrested by Haitian police and forced onto buses bound for Port-au-Prince police headquarters shortly after being repatriated by the U.S. Coast Guard cutter Confidence. A Haitian Red Cross official, Jonel Charles, said that four repatriates from the group ran off and managed to escape arrest. According to the Haitian police, the rest were taken into custody for questioning about the reported hijacking of the boat in which they had been attempting to flee.[51] The next day, police said that all but six of the refugees had been released; the alleged organizer of the voyage and five crew members remained in custody. In early October, Human Rights Watch learned that one person arrested on August 14 was still in police custody.

- 164 Haitians repatriated on October 27 were put onto two buses and taken to police headquarters in Port-au-Prince, where they were questioned about who had organized their voyage, and why they had tried to leave the country. All but four were let go the same day.

- On November 30, the Coast Guard repatriated 321 refugees. After processing by the Red Cross and the INS on the docks, the entire boatload was taken to the police post on the wharf for questioning. According to a witness who was present during the questioning, the police asked each person, among other things, why he or she had left the country. Fourteen were held in custody as alleged organizers of the trip.

51. Barbara Crossette, *Haiti arrests 150 returned by the U.S.*, New York Times, Aug. 15, 1992.

The Bush Administration has tried to dismiss these arrests as mere criminal investigations of the organizers of the boat trips. But none of those held as alleged trip organizers, many of whom have been detained for days, is known to have appeared before a judge or to have been formally charged with any crime. Arresting entire boatloads of people for questioning amounts to penalizing people for leaving Haiti, particularly when they are asked about their reasons for fleeing Haiti.

C. The Government's Survey of Repatriated Haitians Is Deeply Flawed

The survey of some 3,000 repatriates cited by the Bush Administration to defend its policy of forced summary repatriation is deeply flawed in several respects, and does not reliably measure the degree of persecution faced by summarily repatriated Haitians.[52]

First, it is unclear whether the Administration believes the surveys demonstrate that repatriates face no persecution at all or simply no persecution for having been repatriated. State Department spokesman Richard Boucher appeared to be making only the latter, considerably weaker claim, when two days after the institution of forced summary repatriation he announced in reference to the survey: "In no case have they

52. Our analysis of the U.S. government's efforts to monitor repatriated boat people in Haiti is based on:

- more than 200 pages of unclassified telegrams from the U.S. Embassy in Port-au-Prince, sent between mid-February and mid-April 1992. which recount in considerable detail visits to different towns and regions as well as the results of interviews with repatriates;
- two 11-page Justice Department reports summarizing visits by INS officials; and
- information obtained from depositions taken of several government officials, especially Gunther Wagner, the author of one of the Justice Department reports.

found evidence of mistreatment connected to their repatriation."[53] Even if no repatriate faced persecution merely for having been repatriated, that obviously says nothing about persecution for other political reasons.

Second, since two-thirds of the 3,000 repatriates interviewed for the survey were seen while screening was still under way in Guantánamo,[54] the survey says relatively little about the treatment of boat people when all were forcibly and summarily returned to Haiti, without first exempting those most likely to encounter political persecution. Some 10,700 Haitian boat people, roughly 30 percent of the total interviewed at Guantánamo, were found by INS adjudicators to have credible claims of persecution in Haiti and thus were not repatriated. A survey conducted largely in a pool from which those at greatest risk of persecution had been removed (by granting them refugee status) says little about the fate of the pool of Haitians today, all of whom who are summarily and forcibly returned.

Third, the methods used to locate repatriates, including reliance on the Haitian Red Cross and contact with local provincial military commanders, ensured that only those individuals who felt comfortable appearing in public were likely to be interviewed. The more at risk of persecution one felt, the less likely it is that one would dare to appear publicly for an interview.

Fourth, interviews were not conducted in confidential circumstances. For example, an Embassy report on a March 24-26 trip to Haiti's Grand Anse reveals that a soldier was present during interviews in the town of Dame Marie. Questioning

53. Press Briefing (May 26, 1992).

54. Some 2,000 repatriates were interviewed before summary repatriation began. Since then, consular officers have left the Consulate to investigate another 1,000 repatriates. Currently, the only monitoring that is being done is "through review of the refugee claims made [at the Consulate] by repatriates." Hankins Interview (Dec. 10, 1992).

returnees under such circumstances impedes candid description of persecution and deters others who have experienced persecution from meeting with Embassy investigators at all.

Fifth, the primary purpose of the survey appears to have been to discredit any claim of persecution. Investigators were chosen who were expert in the detection of fraudulent claims, rather than knowledgeable about conditions in Haiti or the conduct of human rights field investigations. While detection of fraudulent accounts is a legitimate element of a monitoring effort, the reports reviewed suggest that this aim dominated the investigations. For example, INS intelligence expert Gunther Wagner, who seems to have been responsible for at least 600 of the 3,000 repatriate interviews, knew next to nothing about Haiti and very little about U.S. refugee law. He made his first visit to the country in December 1991, and before starting his interviews received only a one-hour background briefing on country conditions.[55]

These fundamental flaws in the survey's methodology leave it incapable of refuting the findings by Human Rights Watch and other human rights monitoring organizations that (a) in-country processing was never intended as, and does not in fact provide, an adequate alternative to traditional processing of refugees, (b) many forcibly repatriated boat people face a serious risk of persecution, and (c) some Haitian repatriates have in fact encountered persecution. The Bush Administration's summary forcible repatriation of Haitian boat people thus violates the prohibition of *refoulement* contained in international and U.S. law.

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55. J.A. 434-62, P.E. 89, May 5, 1992. Wagner's limited knowledge of the Haitian political scene -- something of unquestionable value in such work -- is revealed in answers he gave in his deposition. Asked what political parties are active in Haiti, he mentioned having heard of the "FCND," and the "KAK" or "KPK" -- none of which exist. Asked for the popular nickname given ousted President Aristide, he responded, again incorrectly, "They call Aristide Kiki." *Id.*

Conclusion

For the reasons set forth above, this Court should affirm the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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No. 92-344

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

MCNARY,

Petitioner,

vs.

HAITIAN CENTERS COUNCIL, INC.

Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Second Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN
IMMIGRATION LAWYERS ASSOCIATION AND THE
IMMIGRATION CLINIC OF THE AMERICAN
IMMIGRATION LAW FOUNDATION
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ISSUE PRESENTED

WHETHER JUDICIAL REVIEW OF THE LEGALITY OF PETITIONERS' PRACTICE OF FORCIBLY REPATRIATING HAITIAN REFUGEES INTERDICTED ON THE HIGH SEAS IS PRECLUDED BY THE IMMIGRATION AND NATIONALITY ACT

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STATEMENT OF INTEREST OF AMICI

Amicus AMERICAN IMMIGRATION LAWYERS ASSOCIATION is a national association of lawyers and law school professors who practice and teach in the fields of immigration and nationality law.[1] AILA has as its objectives, to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence therein; to promote reforms in the laws with regard thereto, and to facilitate the administration of justice therein; and to elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration, nationality and naturalization matters.

Amicus LEGAL ACTION CENTER of the American Immigration Law Foundation (AILF) is a non-profit advocacy and litigation program of AILF, an immigration bar foundation. The mission of the AILF Legal Action Center is to represent the public interest in the fair and just administration of immigration and nationality laws and related laws and policies in order to foster family unification, insure fundamental fairness, and promote economic growth in a pluralistic society.

The petition before this Court involves fundamental questions regarding the rule of law in the immigration field and the denial of basic human rights. The Government's arguments against reviewability of its actions, which is the sole issue addressed in this Brief, involve broad claims of preclusion of review that would have serious consequences for immigration practice and for the fair administration of the laws.

Amici have a direct and serious interest in the development of the immigration law and in the case now before this Court. The familiarity of Amici with the administration of justice in the immigration field lead Amici to believe that this Court would benefit from additional written argument with respect to the

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[1] Letters from counsel to the parties, consenting to the submission of this brief, have been filed with the Clerk.

availability of judicial review for aliens outside the United States generally, as well as for the Respondents in this case.

SUMMARY OF ARGUMENT

Administrative action under the Immigration and Nationality Act of 1952 (INA) is subject to the usual strong presumption in favor of judicial review. Nineteenth-century doctrines disfavoring judicial review of immigration decisions were superseded by the enactment of the Administrative Procedure Act of 1946 (APA) and the INA.

The Government fails in its efforts to overcome this presumption by divining a congressional intent to preclude judicial review at the behest of aliens outside the United States. The particular features of the INA on which the Government relies -- INA § 106 and the doctrine of consular nonreviewability -- create particular, narrow exceptions to the general rule of reviewability, and are not even specifically aimed at a category of "aliens outside the United States." These exceptions do not somehow combine to express a general congressional intent to preclude review. Furthermore, courts do in fact afford judicial review to aliens outside the United States in appropriate situations.

Nor do Respondents lack standing to seek judicial review. There is no general rule denying aliens outside the United States standing to sue. Courts in immigration cases have evolved a prudential standing rule that limits the occasions on which aliens lacking connection to the United States may challenge the denial of immigration benefits. But these prudential considerations weigh in favor of reviewing Petitioners' practice of returning Haitian refugees captured on the high seas -- not merely denying them "entry" to the United States. The standing of those Respondents who have previously been detained at Guantanamo Bay Naval Base and wrongfully repatriated to Haiti is even stronger.

Finally, Petitioners cannot recast their own violations of the INA as unreviewable actions of the President. Immigration enforcement measures based on delegated authority under INA §§ 212(f) and 215 are fully subject to judicial review.

ARGUMENT

I. THE STRONG PRESUMPTION IN FAVOR OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IS FULLY APPLICABLE TO DECISIONS UNDER THE IMMIGRATION LAWS

This Court has recently confirmed that "[t]he strong presumption in favor of judicial review of administrative action" applies equally to the administration of the Immigration and Nationality Act of 1952 (INA). McNary v. Haitian Refugee Center, Inc., 111 S. Ct. 888, 899 (1991). The Court declined, "given the absence of clear congressional language mandating preclusion," id. at 892, to read a restriction on judicial review of individual adjudications as precluding a systemic challenge to unlawful INS procedures. The Government's arguments again fail to overcome this presumption in the present case.

The enactment of the APA and the INA worked a major change in the approach to judicial review in immigration law. See 3 C. Gordon & S. Mailman, Immigration Law & Procedure § 81.01[2] (1992) [hereinafter cited as Gordon & Mailman]. Immigration was one of the first fields of federal government regulation, and pre-APA immigration law preserved features characteristic of this early stage. This Court announced in the nineteenth century that Congress could make an executive officer "the sole and exclusive judge of the existence of those facts [on which an alien's right to enter depends], and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted." Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892). As a result of this maxim, immigration law did not receive the benefit of the presumption of reviewability that this Court later evolved, until Congress itself codified the presumption of reviewability in the Administrative Procedure Act of 1946. In the meantime, judicial review of most immigration decisions was

limited to the review authorized by the habeas corpus statute.[2]

The INA was enacted in 1952 as a comprehensive reconfiguration of the immigration laws. 1 Gordon & Mailman § 2.03. Section 279 of the Act, 8 U.S.C. § 1329, conferred on the district courts jurisdiction of all causes, civil and criminal, arising under any of the immigration provisions, §§ 201-292, 8 U.S.C. §§ 1151-1362. 3 Gordon & Mailman § 81.05[1], at 81-55 to 81-56.

This Court explained the relationship between the judicial review provisions of the APA and the INA in Shaughnessy v. Pedreiro, 349 U.S. 48, 50-52 (1955). Section 12 of the APA, 5 U.S.C. § 559, provides that subsequent legislation shall not supersede or modify the APA unless it "shall do so expressly." The enactment of the INA in 1952 constituted subsequent legislation, and therefore the modern principles of administrative law, as embodied in the APA, took root in immigration law except to the extent that Congress expressly excluded them. Ambiguous references to finality that had been taken as precluding judicial review under the Immigration Act of 1917 could not be sufficient to preclude judicial review under the INA. A nonpreclusive interpretation was "more in harmony with the generous review provisions of the Administrative Procedure Act." 349 U.S. at 51. The Court also noted that Senator McCarran and Representative Walter, the sponsors of both the APA and the INA, had assured Congress of the applicability of APA review to the INA.

As Justice Scalia recently observed, the reasoning in Pedreiro "remains the law," although the precise result in Pedreiro (review of deportation orders by suit for injunction) was expressly superseded by statute. INS v. Doherty, 112 S. Ct. 719, 728 n.1 (1992) (Scalia, J., concurring in part and dissenting in part).

In a simple employment-based immigration case, beginning with the employer's application to the Department of Labor for labor certification, followed by a visa petition to the INS to

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[2] Even in Nishimura Ekiu, the Court made clear that an alien denied entry was restrained of his liberty, and could test the lawfulness of the restraint by writ of habeas corpus. 142 U.S. at 660.

classify the employee as an eligible immigrant, followed by the employee's application for a visa at a consulate abroad, and ending with the employee's arrival at the border for admission or exclusion, denial at any step is a reviewable agency action, except for a consular visa denial, which is subject to a special rule discussed in Part II(B) infra. See, e.g., Digilab, Inc. v. Secretary of Labor, 495 F.2d 323 (1st Cir.), cert. denied, 419 U.S. 840 (1974); (denial of labor certification); Taneja v. Smith, 795 F.2d 355 (4th Cir. 1986) (denial of visa petition); 8 U.S.C. § 1105a(b) (exclusion). The complexity of the immigration laws multiplies the occasions for judicial review, as the leading immigration treatise observes:

> Virtually every immigration determination is now subject to the limited judicial review previously described in this chapter. Thus review proceedings can be brought to question such matters as the following: denials of visa petitions, registry, benefits under the agricultural workers program, waivers for exchange visitors, denial of parole to entry applicant, of approval for a school qualified to accept nonimmigrant students, or withdrawal of such approval, change from one nonimmigrant status to another, denial of a labor certifications, improper seizure or retention of the alien's passport, denial of extension of temporary stay, or of asylum claim, refusal to grant extended voluntary departure, imposition of administrative fine, revoking employment authorization, eligibility for legalization, claim of arbitrary, discriminatory, and unconstitutional action in bringing deportation proceeding when prosecutorial discretion usually exercised to withhold deportations in similar cases, exclusion from a list of companies authorized to conduct immigration medical examinations, breach of immigration bond, denial of advance parole, and adjustment of status.

3 Gordon & Mailman § 81.11[4], at 81-186 to 81-192 (footnotes omitted).

II. THE INA DOES NOT EXPRESS, CLEARLY OR OTHERWISE, AN INTENT TO PRECLUDE JUDICIAL REVIEW OF RESPONDENTS' CLAIMS

The Government argues that the strong presumption of reviewability is overcome in this case because the INA expresses a congressional intention to deny judicial review to some category of aliens that includes the Respondents. The Government never makes clear precisely what category of aliens Congress intended to exclude from judicial review -- for example, aliens who are not permanent residents, aliens who have never been in the United States, aliens outside the United States when an otherwise reviewable action occurs, or aliens outside the United States when they file an action seeking judicial review. In fact, the supposed evidence of this congressional intent points in different directions, and amounts to nothing more than particular exceptions to the normal presumption of judicial review.

Initially, the Government's argument should be put in context by observing that the same method of reasoning could be used to prove that the INA expresses a congressional intention to deny judicial review to United States citizen employers or spouses of aliens. They cannot seek judicial review of exclusion or deportation orders, because the alien can adequately represent his own interests, see, e.g., Garcia v. Boldin, 691 F.2d 1172, 1182 (5th Cir. 1982); they cannot seek judicial review of consular visa denials because no one can. Yet this hardly demonstrates a generalizable congressional intent to bar citizen employers and spouses from seeking judicial review. See, e.g., Pesikoff v. Secretary of Labor, 501 F.2d 757 (D.C. Cir. 1974), cert. denied, 419 U.S. 1038 (1974); Friedberger v. Schultz, 616 F. Supp. 1315 (E.D. Pa. 1985); 3 Gordon & Mailman § 81.11[4] at 81-195.

A. INA § 106 Provides No Evidence of a General Congressional Intent to Preclude Judicial Review of Matters Outside Its Scope

Section 106 of the INA, 8 U.S.C. § 1105a, sets forth the

exclusive means for judicial review of final orders of exclusion and deportation entered against individual aliens. Since the Government insists that interdiction is neither exclusion nor deportation, and since the Respondents in this case do not seek review of their nonrefoulement claims on individual grounds, the exclusivity of § 106 is doubly irrelevant. But the Government's argument is broader: that the exclusivity of § 106 implies the unavailability of judicial review for agency actions entirely outside the context of exclusion or deportation proceedings. An examination of the INA as a whole yields no such conclusion.

Section 106 was inserted in the INA at a later date. Pub. L. 87-301, § 5(a), Sept. 26, 1961, 75 Stat. 641. The 1961 Act was the first express provision regarding judicial review in the immigration laws. See 3 Gordon & Mailman § 81.01[2], at 81-6. Its purpose was to remedy specific abuses. The amendment was motivated by frustration with the opportunities for delay created by the broad menu of remedial options in exclusion and deportation cases, particularly those involving deportation of criminal and subversive aliens. Cheng Fan Kwok v. INS, 392 U.S. 206, 214 (1968); Foti v. INS, 375 U.S. 217, 224-25 (1963); H.R. Rep. No. 1086, 87th Cong., 1st Sess. (1961), reprinted in [1961] U.S. Code, Cong. & Ad. News 2950, 2967. Section 106 carved out two exceptions to the general rule of district court review under the APA. First, final orders of deportation were to be reviewed only by petition in the courts of appeals, unless the alien was held in custody. The purpose of this change was to facilitate timely enforcement of deportation by eliminating duplicative review in the trial and appellate courts, and consolidating all the issues that arose in the deportation hearing, with res judicata effect, in one review proceeding. Foti, 375 U.S. at 312-13. Second, exclusion orders were to be reviewed only on habeas corpus, and with res judicata effect. This change was intended to take advantage of the expeditious procedures for deciding habeas cases, and to channel review of exclusion cases away from the District of Columbia. H.R. Rep. No. 1086, [1961] U.S. Code, Cong. & Ad. News at 2976-77. The limitation to habeas review of exclusion orders put pressure on aliens excluded

at land borders to acquiesce in their exclusion, because they could achieve judicial review only by surrendering into custody. See id. at 2974; Brownell v. Tom We Shung, 352 U.S. 180, 183 (1956) (declaratory judgment method permitted alien to avoid "odium of arrest and detention); 3 Gordon & Mailman § 81.04[1][c].

Section 106(c) further provides that, in both deportation and exclusion cases, there shall be no judicial review if the alien departs from the United States after the issuance of the order. This limit reflects the traditional rule that an alien who voluntarily departs while under an order of deportation has executed the order and abandoned the appeal, see Mrvica v. Esperdy, 376 U.S. 560 (1964) (explaining the rule); Chen v. INS, 418 F.2d 209 (8th Cir. 1969).[3] It also permits the government to achieve expeditious and lasting deportation of aliens who delay in seeking judicial review.

Section 106(c) has been construed narrowly according to its language and purpose. Deportation in violation of the automatic stay that attaches under § 106(a)(3) when the petition for review is served on the INS does not defeat jurisdiction. See, e.g., Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985). An alien who has already departed the country can seek judicial review when the INS insists on having an exclusion order entered against him after his departure, since § 106(c) does not address this converse situation. Lesbian/Gay Freedom Day, Inc. v. U.S. INS, 541 F. Supp. 569, 574-75 (N.D. Cal. 1982), aff'd sub nom. Hill v. U.S. INS, 714 F.2d 1470 (9th Cir. 1983). Moreover, some courts have held that a deportation prior to the filing of the petition does not preclude judicial review if it was illegally executed. E.g., Mendez v. INS, 563 F.2d 956 (9th Cir. 1977); but see Umanzor v. Lambert, 782 F.2d 1299 (5th Cir. 1986)

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[3] The House Report says only: "In an effort to curtail, if not to eliminate repetitious and unjustified appeals to courts for interference with the enforcement of deportation orders, the section declares that an order of deportation or of exclusion shall not be reviewed by a court if the alien has not exhausted his administrative remedies, or if he has departed from the United States." H.R. Rep. No. 1086, [1961] U.S. Code, Cong. & Ad. News at 2971-72.

(criticizing Mendez); cf. United States v. Mendoza-Lopez, 481 U.S. 828, 837 & n.13 (1987) (correctness of Mendez open).

Thus § 106 was intended to simplify the methods of judicial review of final deportation and exclusion orders, and to bar repeated review. To describe the resulting set of rules as targeted against aliens "outside the United States," let alone as expressing a general policy of precluding judicial review for such aliens, misconceives both its purpose and its effect.[4]

It should also be emphasized that the exclusivity of § 106 relates only to final orders of deportation and exclusion. This Court made clear in Cheng Fan Kwok v. INS, 392 U.S. 206, 210 (1968), that determinations outside the scope of the deportation hearing remain subject to the usual forms of APA review. "In situations to which the provisions of § 106(a) are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court." Class actions challenging general agency practices are among those situations. See, e.g., INS v. National Coalition for Immigrants' Rights, 112 S. Ct. 551 (1991); Campos v. Nail, 940 F.2d 495 (9th Cir. 1991); Etuk v. Slattery, 936 F.2d 1433 (2d Cir. 1991); Ayuda, Inc. v. Attorney General, 848 F.2d 1297 (D.C. Cir. 1988).

The Government's claimed contrast between § 106 and § 207 (8 U.S.C. § 1157), the overseas refugee provision, is meaningless. Of course, § 207 "does not provide for either administrative or judicial review," Brief for Petitioners at 15 (emphasis deleted). Few substantive provisions of the INA do. The asylum provision, § 208, does not provide for administrative or judicial review either; nor does the status adjustment provision

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[4] The Government cites Cobb v. Murrell, 386 F.2d 947 (5th Cir. 1967), and Braude v. Wirtz, 350 F.2d 702 (9th Cir. 1965), which viewed § 106 as relevant to whether aliens outside the United States could seek review of a Labor Department decision that would bar their entry. Both rely on a pre-APA presumption that an immigration decision is not reviewable unless Congress expressly so provides, and on the now-superseded rule that standing requires violation of a legal right. They are historically interesting, but provide no reasoned support for the argument.

for refugees and asylees in the United States, § 209. The review the courts afford with respect to these provisions results from the application of general principles of administrative law, including exhaustion, finality, and the availability of declaratory and injunctive relief against patterns of violation of statutory rights. See, e.g., Montes v. Thornburgh, 919 F.2d 531 (9th Cir. 1990) (asylum applicants challenging pattern of procedural violations).

The Government places great weight on a sentence of dictum contained in a footnote in one of the cases that prompted § 106, Brownell v. Tom We Shung, 352 U.S. 180 (1956). In that case, this Court had endorsed declaratory judgment proceedings as an alternative to habeas corpus review of exclusion decisions. The Court then added, "We do not suggest, of course, that an alien who has never presented himself at the borders of this country may avail himself of the declaratory judgment action by bringing the action from abroad." Id. at 184 n.3. In context, however, that sentence obviously refers to a requirement of exhaustion of administrative remedies. The dispute over the alien's excludability was to be presented to the district court as a review of findings of the Special Inquiry Board (the predecessor of the current Immigration Judge), not as an opportunity for factfinding in the first instance, jumping over the statutory process for inspection of arriving immigrants.[5] The Court surely did not foresee, and was not addressing, the case of refugees who have no administrative remedies to exhaust because they face summary repatriation after capture on the high seas, under a procedure that has no statutory basis and that violates an express statutory prohibition.

B. The Doctrine of Consular Nonreviewability Does Not Provide Evidence of a General Congressional Intent to Preclude Aliens Outside the United States From Seeking Judicial Review

[5] In context, the footnote would not be an allusion to the consular nonreviewability doctrine, because the statute under which Tom We Shung applied waived the requirement of a consular visa. See Act of Dec. 28, 1945, ch. 591, § 1, 59 Stat. 659.

The Government invokes the much-criticized doctrine of the nonreviewability of consuls' decisions denying visas, which has generally been considered a historical anomaly,[6] as if it formed part of the mainstream pattern of the INA. That doctrine is ill-suited to support the Government's argument that the INA wholly precludes judicial review at the behest of aliens outside the United States, in three major respects: first, the doctrine is a historical exception with a specific statutory basis limited to consular officers; second, the doctrine applies only to individual exercises of consular discretion, not to challenges to generally applicable rules that guide consular discretion; and third, the doctrine does not target overseas aliens, but rather anyone seeking to challenge an individual consular visa denial.

1. This Court has never endorsed the consular nonreviewability exception, and so has had no occasion to describe its history. Consular visas were first made a prerequisite for seeking admission to the United States during World War I, and Congress continued this requirement thereafter. 1 Gordon & Mailman § 8.01, at 8-3. In those pre-APA years, the courts adhered to the view that habeas corpus was the only authorized vehicle for review of immigration decisions. But the consul's denial of a visa did not itself place an alien in custody, and so habeas would not lie.

The consular nonreviewability doctrine arose in the 1920's, when lower federal courts rejected alternative methods of attacking the consul's decision. The seminal cases were United States ex rel. London v. Phelps, 22 F.2d 288 (2d Cir. 1927), cert. denied, 276 U.S. 630 (1928) (alien who came to border without a visa could not make her exclusion hearing a vehicle for challenging visa denial), and United States ex rel. Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir.), cert. denied, 279 U.S. 868 (1929) (citizen husband could not compel consul by mandamus to

[6] The literature is summarized in James A.R. Nafziger, Review of Visa Denials by Consular Officers, 66 Wash. L. Rev. 1 (1991) (based on a report prepared for the Administrative Conference of the United States). See also 3 Gordon & Mailman § 81.11[2].

issue a visa to his wife). The latter court observed, "We are not able to find any provision of the immigration laws which provides for an official review of the action of the consular officers in such case by a cabinet officer or other authority." Id. at 986.

The mystery is how the consular nonreviewability doctrine survived the passage of the APA and the recodification of the immigration laws in 1952. The courts that have confronted this issue generally identify Sections 104(a) and 221(a) of the INA, 8 U.S.C. §§ 1104(a), 1201(a) as the modern statutory basis for precluding review. Those sections assign visa issuance functions to consular officers, and expressly except from the Secretary of State's supervisory responsibility "those powers, duties, and functions conferred upon the consular officers relating to the granting or refusal of visas." 8 U.S.C. § 1104(a). Courts have extrapolated from this rejection of administrative review a preclusion of judicial review of individual visa denials.[7]

Since the doctrine of consular nonreviewability has an idiosyncratic origin based on the noncustodial, visa-issuing functions of consuls and a perceived congressional intent to shield them from supervision, that doctrine has no relevance to the capture of refugees on the high seas and their forcible repatriation to Haiti by Coast Guard and INS personnel.

2. The consular nonreviewability doctrine focuses on the

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[7] See, e.g., City of New York v. Baker, 878 F.2d 507, 512 (D.C. Cir. 1989); Li Hing of Hong Kong, Inc. v. Levin, 800 F.2d 970, 971 (9th Cir. 1986); Loza-Bedoya v. INS, 410 F.2d 343, 347 (9th Cir. 1969); Kummer v. Shultz, 578 F. Supp. 341 (N.D. Tex. 1984); Ubiera v. Bell, 463 F. Supp. 181, 184 (S.D.N.Y. 1978); Hermina Sague v. United States, 416 F. Supp. 217 (D.P.R. 1976); Licea-Gomez v. Pilliod, 193 F. Supp. 577, 582 (N.D. Ill. 1960).

Some courts have also seen support for the consular nonreviewability doctrine in this Court's decision in Kleindienst v. Mandel, 408 U.S. 753 (1972). Consular nonreviewability, however, was never mentioned in Mandel, and the Court did review on the merits the Attorney General's refusal to waive a ground of exclusion so that Mandel could receive a visa. See 408 U.S. at 759, 769.

individual exercises of discretion by consuls, and does not preclude judicial review of the systematic practices that structure the visa issuance function itself. The APA makes those practices reviewable, and the lower federal courts have reviewed them. See Mulligan v. Schultz, 848 F.2d 655 (5th Cir. 1988) (aliens can seek review of State Department's choice of starting point for visa priority dates); Ventura-Escamilla v. INS, 647 F.2d 28 (9th Cir. 1981) (aliens may challenge State Department regulation by which consular officials determine priority dates, but not consul's factual determination of date of receipt); Contreras de Avilia v. Civiletti, 643 F.2d 471 (7th Cir.), cert. denied, 454 U.S. 860 (1981) (aliens may challenge State Department's allocation of visas issued during transition period to quota); Silva v. Bell, 605 F.2d 978 (7th Cir. 1979) (aliens denied visas as result of State Department's erroneous quota calculation entitled to judicial review and reallocation of visas); Angco v. Haig, 514 F. Supp. 1328 (E.D. Pa. 1981) (aliens can seek review of State Department's refusal to prorate visa allotment for oversubscribed nation); see also Martinez v. Bell, 468 F. Supp. 719 (S.D.N.Y. 1979) (citizen children whose parents were denied visas may challenge constitutionality of statute repealing their priority status); Fiallo v. Levi, 406 F. Supp. 162 (E.D.N.Y. 1975) (three-judge court) (alien may challenge constitutionality of statute on which visa denial was based), aff'd on the merits sub nom. Fiallo v. Bell, 430 U.S. 787 (1977). Thus the consular nonreviewability doctrine does not, even by the most distant analogy, suggest any obstacle to review of the Petitioners' practice of forcibly repatriating Haitian refugees.

3. The Government invokes the consular nonreviewability doctrine as if it were a doctrine dealing specifically with the rights of aliens located overseas. From the doctrine's inception, however, it has applied regardless of the alien's location, and regardless of the identity of the plaintiff. The London case involved an alien in exclusion proceedings in Vermont; the Ulrich case was brought in the District of Columbia by the alien's citizen husband. Later applications have continued to bar review of consular decisions at the behest of visa applicants who are already

in the United States, see, e.g., Ventura-Escamilla v. INS, 647 F.2d 28 (9th Cir. 1981); Burrafato v. United States Department of State, 523 F.2d 554 (2d Cir. 1975), cert. denied, 424 U.S. 910 (1976), or at the behest of citizen or permanent resident alien spouses, parents or children of the rejected applicant, see, e.g., Wan Shih Hsieh v. Kiley, 569 F.2d 1179 (2d Cir.) (permanent resident father), cert. denied, 439 U.S. 828 (1978); Hermina Sague v. United States, 416 F. Supp. 217 (D.P.R. 1976) (citizen wife); see also Li Hing of Hong Kong, Inc. v. Levin, 800 F.2d 970 (9th Cir. 1986) (domestic employer).

Just as it would be erroneous to equate review of consular decisions with review at the behest of aliens outside the United States, so would it be erroneous to equate decisions made by consuls with decisions made outside the United States. The INS itself has offices in numerous foreign cities where officers are empowered to make decisions, including grant or denial of visa petitions and waivers of grounds of excludability, many of which are then subject to administrative and judicial review. See 8 C.F.R. §§ 3.1(b), 103.1(f)(2), 103.1(o)(2) (granting this authority to Athens, Bangkok, Frankfurt, Guadalajara, Hong Kong, Manila, Mexico City, Monterrey, New Delhi, Panama City, Rome, Seoul, Singapore, and Vienna offices), 103.3; Matter of Darwish, 14 I. & N. Dec. 307 (BIA 1973); Matter of H---, 14 I. & N. Dec. 185 (Reg. Comm'r 1972); Matter of Allison, 12 I. & N. Dec. 835 (BIA 1968); 1 Gordon & Mailman § 3.03[5].

C. The Lower Courts Have Recognized That Aliens Outside the United States are Not Necessarily Precluded From Judicial Review

The Government's effort to extrapolate a general rule of preclusion from two idiosyncratic data points also founders on the fact that courts have recognized that the INA and the APA do permit aliens outside the United States to seek judicial review of immigration decisions affecting them. While some of these cases involve unusual circumstances, they are appropriate precedents for the unusual situation currently before this Court.

Amici will discuss the principles behind these cases infra, in an analysis of standing, because the courts that afford or deny judicial review to aliens outside the United States are applying prudential standing rules of their own creation, rather than any statutory rules of preclusion provided by Congress. It should suffice here to note the existence of cases permitting aliens outside the United States to seek judicial review of decisions of the immigration authorities. Some of these cases involve aliens outside the United States who have previously been in United States territory,[8] while others involve aliens who have never been in United States territory.[9] Respondents in the present case

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[8] See Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985) (parents who have departed United States can challenge departure control order interfering with their custody of child who remained); Jaimez-Revolla v. Bell, 598 F.2d 243 (D.C. Cir. 1979) (deported alien can challenge Attorney General's denial of permission to apply for readmission); Estrada v. Ahrens, 296 F.2d 690, 694 (5th Cir. 1961) (alien who took temporary trip abroad while awaiting decision on admission could challenge INS refusal to permit him to return and complete proceeding); Guirola-Beeche v. U.S. Department of Justice, 662 F. Supp. 1414 (S.D. Fla. 1987) (alien who voluntarily departed United States can challenge subsequent forfeiture of his delivery bond); Lesbian/Gay Freedom Day, Inc. v. U.S. INS, 541 F. Supp. 569, 574-75 (N.D. Cal. 1982) (alien can seek judicial review of exclusion order entered after his departure), aff'd sub nom. Hill v. U.S. INS, 714 F.2d 1470 (9th Cir. 1983); see also Catholic Social Services, Inc. v. Meese, 664 F. Supp. 1378 (E.D. Cal. 1987) (granting preliminary injunction to aliens outside United States eligible to apply for SAW legalization under 8 U.S.C. § 1160); Catholic Social Services, Inc. v. Thornburgh, 956 F.2d 914 (9th Cir. 1992) (affirming on the merits denial of permanent injunction to class of aliens outside United States wishing to apply for legalization under 8 U.S.C. § 1255a), cert. granted sub nom. Barr v. Catholic Social Services, Inc., 112 S. Ct. 2990 (1992).

[9] See Johns v. Department of Justice, 653 F.2d 884 (5th Cir. 1981) (alien mother outside United States who seeks return of her child is entitled to participate in action for judicial review of child's deportation); Contreras de Avilia v. Civiletti, 643 F.2d 471 (7th Cir.), cert. denied,

include both categories. One special class of cases, whose correctness this Court has not resolved, involves the Mendez doctrine that INA § 106(c) does not preclude judicial review of deportation orders when the deportation was illegally executed before the alien sought judicial review.[10]

As all of these cases indicate, the INA does not express, clearly or otherwise, a congressional intention that aliens outside the United States be precluded from seeking judicial review in all cases. Nor does it express a congressional intention to preclude judicial review in the present case, involving a procedure never contemplated by Congress.

III. PRUDENTIAL STANDING RULES DO NOT BAR THE ACTION

The Brief Amicus Curiae of the Federation for American Immigration Reform openly champions a contention that hovers in the margins of the Government's argument: that aliens outside the United States lack standing to seek judicial review of any aspect of the administration or enforcement of the United States immigration laws.[11] This contention provided the rationale for

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454 U.S. 860 (1981) (class of all Mexican visa applicants can challenge State Department's allocation of visas issued to Mexican quota during transition period); Silva v. Bell, 605 F.2d 978 (7th Cir. 1979) (aliens outside United States as well as within entitled to judicial review of State Department's erroneous quota calculation and reallocation of visas).

[10] See United States v. Mendoza-Lopez, 481 U.S. 828, 837 & n.13 (1987); Wiedersperg v. INS, 896 F.2d 1179 (9th Cir. 1990); Zepeda-Melendez v. INS, 741 F.2d 285 (9th Cir. 1984); Estrada-Rosales v. INS, 645 F.2d 819 (9th Cir. 1981); Juarez v. INS, 732 F.2d 58 (6th Cir. 1984); Newton v. INS, 622 F.2d 1193 (3d Cir. 1980); Mendez v. INS, 563 F.2d 956 (9th Cir. 1977); but see Umanzor v. Lambert, 782 F.2d 1299 (5th Cir. 1986) (rejecting Mendez doctrine).

[11] Brief for Amicus Curiae FAIR at 16. That Brief also makes the novel contention that it would not be constitutional to grant Respondents standing, because "illegal immigrants" have no legally protected interests.

some of the cases that the Government cites in support of its preclusion argument, and the Eleventh Circuit in Haitian Refugee Center v. Baker, 953 F.2d 1498, 1507 & n.3 (11th Cir.), cert. denied. 112 S. Ct. 1245 (1992), regarded itself as bound by a prior Fifth Circuit standing decision. Amici will therefore confront directly the supposed rule that "the Administrative Procedure Act . . . does not authorize actions by aliens who are not physically present within the United States," Estrada v. Ahrens, 296 F.2d 690, 694 (5th Cir. 1961) (rejecting this rule).

The court of appeals found -- correctly, we submit -- that the repatriation of refugees to Haiti violated the nonrefoulement command in § 243(h) of the INA, 8 U.S.C. § 1253(h), which also applies on the high seas. Under the APA, standing depends on two elements, injury in fact and inclusion within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970); Air Courier Conference of America v. American Postal Workers Union, 111 S. Ct. 913, 917-18 (1991). It is self-evident that forcible repatriation inflicts injury in fact. It is logically inescapable that nonresident refugees are among the intended beneficiaries of the nonrefoulement provision as construed by the court of appeals, and therefore within the zone of interests of that statute, as well as of the human rights treaty that the statute implements.

Nonetheless, it is suggested that Respondents lack

Id. at 21-23. Most of the fallacies on which this argument rests are apparent, but perhaps Amici should point out that United States law does not treat illegal entry by a conceded refugee coming directly from the persecuting country as a punishable crime -- to penalize such entry would violate Article 31.1 of the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. See Singh v. Nelson, 623 F. Supp. 545, 559-61 (S.D.N.Y. 1985). Far from being a crime, asylum-seeking is proclaimed as a human right by Article 14 of the Universal Declaration of Human Rights. U.N. G.A. Res. 217A, U.N. GAOR, 3rd Sess., Doc. A/810, at 71 (1948).

standing, on the basis of a supposed general rule that aliens outside the United States lack standing to sue. The answer to this contention is three-fold. First, there is no such general rule. Second, there is no rigid rule depriving nonresident aliens of standing in the immigration context. Third, to the extent that some courts have recognized or denied standing on prudential grounds for nonresident aliens seeking judicial review of particular immigration decisions, the prudential considerations support the standing of the Respondents in this case.

A. There is No General Rule Denying Standing to Sue in United States Courts to Aliens Outside the United States

The usual rule in this country has always been that aliens, including aliens who have never entered the United States, have standing to sue in the state and federal courts for violations of their rights. "Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights." Disconto Gesellschaft v. Umbreit, 208 U.S. 570, 578 (1908) (German bank seeking return of money brought into United States by fugitive).

Very early in the history of the common law, all aliens may have been treated as dangerous strangers ineligible to sue in the courts of the king, but this rule disappeared in England long before the United States became independent. Ex parte Kawato, 317 U.S. 69, 72-73 (1942). The Constitution explicitly contemplates aliens' access to the courts, and Article III confers federal jurisdiction over suits between aliens and citizens. The right of aliens to sue from abroad for protection of their interests was eloquently defended in Taylor v. Carpenter, 23 F. Cas. 744, 747-50 (C.C.D. Mass 1846) (No. 13,785) (Woodbury, Circuit Justice) (trademark infringement); see also Sardino v. Federal Reserve Bank of New York, 361 F.2d 106, 111 (2d Cir.) (Friendly, J.), cert. denied, 385 U.S. 898 (1966).

There is a traditional exception barring enemy aliens from suing during wartime, but this exception does not undercut the general presumption of nonresident aliens' standing. The "disabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage." Johnson v. Eisentrager, 339 U.S. 763, 772 (1950).[12] The scope of the exclusion is tailored to the necessities of war. Id. at 776.

The standing of aliens outside the United States is not limited to cases involving property inside the United States.[13] They are similarly entitled to sue for torts. See, e.g., McGovern v. Philadelphia & Reading Railway Co., 235 U.S. 389 (1914) (nonresident alien parents eligible beneficiaries under FELA in wrongful death action). Since torts are transitory actions, nonresident aliens may also sue in the United States for torts committed abroad, if they can obtain jurisdiction over the defendant here. See, e.g., In re Oil Spill by the Amoco Cadiz, 699 F.2d 909 (7th Cir.), cert. denied, 464 U.S. 864 (1983); In re Aircrash in Bali, 684 F.2d 1301 (9th Cir. 1982). Such an action might be dismissed on forum non conveniens grounds, but only if an alternative forum exists. See, e.g., Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254-55 & n.22 (1981).

Aliens outside the United States have standing to sue government defendants as well as private defendants. See, e.g., Zschernig v. Miller, 389 U.S. 429 (1968) (vindicating inheritance rights of aliens residing in Communist countries); Trojan Technologies, Inc. v. Pennsylvania, 916 F.2d 903 (3rd Cir. 1990) (foreign manufacturer challenging protectionist procurement policy), cert. denied, 111 S. Ct. 2814 (1991); Constructores

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[12] There are also dicta in Johnson v. Eisentrager suggesting a broader barrier to suits by overseas alien friends, but the literal implications of these dicta cannot be reconciled with the myriad of cases permitting nonresident aliens to sue to protect their rights.

[13] A contrary suggestion appears in then-Judge Burger's opinion in Kukatush Mining Corp. v. SEC, 309 F.2d 647, 650 (D.C. Cir. 1962), although he adds as a second exception immigration cases, where standing is more generously afforded to nonresident aliens.

Civiles de Centroamerica, S.A. v. Hannah, 459 F.2d 1183 (D.C. Cir. 1972) (foreign contractor challenging disqualification for bidding on overseas road contract). In some constitutional cases, courts have united their discussion of standing with the substantive question whether the overseas aliens enjoy the protection of the asserted constitutional right under the circumstances. See, e.g., DKT Memorial Fund Ltd. v. Agency for International Development, 887 F.2d 275, 283-86 (D.C. Cir. 1989); Cardenas v. Smith, 733 F.2d 909, 916-17 (D.C. Cir. 1984). This Court, however, did not even mention standing in Kleindienst v. Mandel, 408 U.S. 753 (1972), limiting itself to the observation that Mandel, an "unadmitted and nonresident alien" was merely a symbolic plaintiff because any constitutional challenge on his behalf to the immigration laws was clearly foreclosed on the merits. 408 U.S. at 762.

B. Courts Have Regulated the Access of Aliens Outside the United States to Judicial Review of Immigration Decisions Through Flexible Prudential Standing Rules

Just as there is no general rule denying nonresident aliens standing to sue in American courts, so is there no rigid rule denying aliens outside the United States standing to seek judicial review of immigration decisions. The Government relies on cases decided prior to 1970 that denied standing to overseas aliens for reasons incompatible with this Court's modernization of the APA standing rules in Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970). Later cases suggest that aliens outside the United States may be barred from judicial review by a prudential standing rule whose outcome depends on a variety of factors.[14]

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[14] The Gordon and Mailman treatise is less helpful than usual in this context, because it lists inconsistent holdings without attempting a synthesis. 3 Gordon & Mailman § 81.01[3].

In the 1960's, some courts held that neither aliens outside the United States nor their employers or relatives inside the United States had standing to challenge administrative determinations that would prevent their immigration. See Cobb v. Murrell, 386 F.2d 947 (5th Cir. 1967) (labor certification); Braude v. Wirtz, 350 F.2d 702 (9th Cir. 1965) (labor certification); Montgomery v. Ffrench, 299 F.2d 730 (8th Cir. 1962) (petition for adopted child); but see Estrada v. Ahrens, 296 F.2d 690, 694-95 (5th Cir. 1961) (Wisdom, J.) (under APA nonresident aliens outside the United States are persons aggrieved and so entitled to judicial review, absent express preclusion). These opinions prominently featured the insistence that the entry of an alien from abroad was a privilege rather than a right, so that neither the alien nor the employer or relative suffered legal wrong when entry was denied. They also emphasized the rule, which this Court had already found to be superseded by the APA, that immigration decisions were not reviewable unless review was expressly authorized by statute.

The negative decisions of the 1960's were overtaken by a combination of developments in administrative law: this Court's broad interpretation of APA standing in Data Processing, its renewed emphasis on the presumption of reviewability in Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), its endorsement of pre-enforcement judicial review in Abbott Laboratories, and its narrow interpretation of the category of action "committed to agency discretion by law" in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). Once "legal wrong" was no longer the key to standing, the characterization of immigration as a privilege lost its relevance to the standing of employers, relatives, and aliens themselves. See Secretary of Labor v. Farino, 490 F.2d 885, 889 (7th Cir. 1973) (Cobb and Braude "no longer tenable"); see also Pesikoff v. Secretary of Labor, 501 F.2d 757, 760 (D.C. Cir.), cert. denied, 419 U.S. 1038 (1974); Reddy, Inc. v. U.S. Dept. of Labor, 492 F.2d 538, 542-43 (5th Cir. 1974). Once pre-enforcement challenge to regulations became routine, visa regulations could be reviewed without disturbing the discretion of individual consuls or implicating the restrictions of § 106 on review of individual exclusion orders. See International

Union of Bricklayers v. Meese, 761 F.2d 798, 801 (D.C. Cir. 1985).

The surviving rationale for denying standing to aliens outside the United States was identified by the district court in Chinese American Civic Council v. Attorney General, 396 F. Supp. 1250 (D.D.C. 1975), aff'd on other grounds, 566 F.2d 321 (D.C. Cir. 1977). In less than a sentence, the court invoked "the policy reasons against affording a Federal forum for a person anywhere in the world challenging denial of entry or immigration status." 396 F. Supp. at 1251. In other words, the burden on the Government and the courts would be excessive if the courts entertained an unlimited category of suits by persons whose only connection to the United States was the desire to travel there.

The D.C. Circuit emphasized the limits of this prudential standing analysis in Jaimez-Revolla v. Bell, 598 F.2d 243 (D.C. Cir. 1979). The plaintiff in that case was not any random person, but a U.S. citizen's husband, who had previously been in the United States and had voluntarily returned to Mexico in order to seek permission to reenter. Because there was no evidence of congressional intent to preclude review, and because denial of standing would discourage regularization of status, the court considered it improper to invoke a prudential standing barrier.

The Seventh Circuit in Silva v. Bell, 605 F.2d 978, 984 (7th Cir. 1979), applied these "prudential principles" to grant standing to a class including "many thousands" of aliens who had never been in the United States. The only necessary connection between those aliens and the United States was their status as applicants for immigrant visas, which had been withheld because of misallocation. Nonetheless, the court found that both justice and judicial economy would be served by affording those aliens equal treatment with class members who were already present in the United States as nonimmigrants.

The INS also challenged an absent alien's standing to sue in Lesbian/Gay Freedom Day, Inc. v. U.S. INS, 541 F. Supp. 569, 574-76 (N.D. Cal. 1982), aff'd sub nom. Hill v. U.S. INS, 714 F.2d 1470 (9th Cir. 1983). The alien, a temporary visitor, had departed after prevailing at an exclusion hearing, but while the

INS was still appealing it to the BIA. The BIA later reversed the Immigration Judge's decision and entered an order of exclusion. When the alien sought judicial review, the INS contended that his departure deprived him of standing and mooted the case. The district court held that INA § 106(c) did not preclude review, because he had departed before, not after, the entry of the exclusion order. And it held that the INS's insistence on continuing the case after his departure entitled him to review of an order that would have negative consequences on his future trips.

The factors that lower courts have used in applying this prudential standing rule appear to include the following: the alien's connection to the United States; consequences of denying review for the alien; whether denial of review would frustrate the enjoyment of a right granted by Congress; whether limiting review to aliens inside the United States would create an incentive for aliens to enter or remain illegally; the extent to which initiative in producing the dispute was taken by the INS; the absence of express congressional preclusion; and the burden that review would place on the courts in terms of the number and complexity of cases. Other courts have permitted aliens outside the United States to challenge immigration decisions, with less analysis of the reasons. See cases cited in Part II(C) supra.

C. Prudential Standing Analysis Confirms Respondents' Standing to Seek Judicial Review

The circumstances of this case are not easily replicable. This case is not about denial of entry to the United States. It is about refoulement to Haiti of refugees captured by the United States on the high seas, regardless of their intended destination. The unique relationship that the United States government by its actions has established with these refugees affords them standing to challenge the legality of this exercise in deliberate refoulement.

1. Refugees Threatened with Capture and Return to Haiti Have Standing to Seek Judicial Review

Negative immigration decisions in ordinary cases do not place overseas aliens within the jurisdiction or custody of the United States. Consuls who deny visas do not arrest applicants in order to prevent them from migrating illegally, nor do they physically prevent them from emigrating to other countries.

Prudential standing limitations, based on a judicial concern not to entertain too many suits by distant aliens with insubstantial stakes, do not require dismissal of this action. Respondents ask this Court to determine whether, as the Second Circuit held, Congress has prohibited the Executive to reach out onto the high seas to capture and repatriate refugees. The interdiction program gives them no administrative remedies to exhaust, and they are not requesting judicial determination of their individual claims. They are fleeing a de facto government whose brutality has provoked condemnation from the United States and the world.

The factors employed by the lower courts in applying the prudential standing rule weigh in favor of Respondents' standing. The connection between Respondents and the United States is supplied by Petitioners' action in blockading the coast of Haiti to prevent their flight; this is affirmative interference with Respondents' liberty, not the passive receipt of an application for immigration benefits. As the Government concedes, there is no express congressional preclusion of judicial review. The consequences of permitting forced repatriation of refugees are severe, and denial of review would vitiate the right to nonrefoulement granted by Congress. Indeed, if the applicability of INA § 243(h) to U.S. government action on the high seas cannot be determined in this action, it is difficult to conceive of circumstances in which it could ever be determined. Nor would affording review in this case place an unacceptable burden on the federal courts, in the present or the future. The issue presented is purely one of law, it does not turn on individualized factors, and it requires no factfinding in foreign countries outside the control of the United States. The unprecedented nature of Petitioners' actions make this case easily distinguishable from the mass of immigration decisions that the prudential standing barrier is designed to keep out of the federal courts.

2. Respondents Who Were Wrongfully Returned From Guantanamo Have Standing to Seek Judicial Review

One subclass of Respondents has an even stronger basis in precedent for standing to sue: those refugees who were wrongfully repatriated from the Guantanamo Bay Naval Base, and need to flee Haiti again. Some class members, including a named plaintiff who appears in the relevant portion of the record under the designation "M. Bertrand," and another class member who appears under the designation "M. Remy,"[15] are not aliens who have never been presented to INS officials -- they were previously screened in by Petitioners and brought to Guantanamo, where they were detained for months. These Respondents then asserted the right to be advised by counsel in any further asylum interviewing, and in consequence were forcibly repatriated to Haiti, where they had to go into hiding. The Second Circuit has since affirmed a preliminary injunction against repatriation of screened-in plaintiffs while denying them access to their counsel, relying on the Due Process Clause of the Fifth Amendment. Haitian Centers Council, Inc. v. McNary (HCC I), 969 F.2d 1326 (2d Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3287 (No. 92-528).

Several of the cases affording judicial review to aliens outside the United States emphasize the aliens' prior presence in the United States as a connecting factor that justifies affording them a forum. Moreover, the Mendez line of cases focuses specifically on aliens who have been deported from the United States irregularly. See note 10 supra. By its own terms, the Mendez doctrine involves only an implied exception to an express statutory prohibition on review of executed deportation orders.

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[15] See Pl. Ex. 84, J.A. __ (M. Remy); Pl. Ex. 85 (M. Bertrand), J.A. ____. The plight of these plaintiffs was called to the attention of the court of appeals in Brief for Appellants, Haitian Centers Council, Inc. v. McNary, No. 92-6144, at 43-44 & nn. 88, 89 (2d Cir. 1992). The actual names of these plaintiffs were placed under seal for their protection after their forced return to Haiti.

But it indicates a continuing connection between the United States and illegally removed aliens that would also justify an exception to a judicially created prudential standing barrier.

Space does not permit an adequate discussion in this brief of the legal and constitutional status of the Guantanamo Bay Naval Base. The issue was briefed before the Second Circuit, which considered the Due Process Clause of the Fifth Amendment likely to be applicable to aliens at Guantanamo in light of the United States' power of "complete jurisdiction and control" over the territory. HCC I, 969 F.2d at 1342-43. The INA does not include Guantanamo as part of its general definition of the "United States," see INA § 101(a)(38), 8 U.S.C. § 1101(a)(38), but does include it within the definition of the "United States" for purposes of INA § 215, 8 U.S.C. § 1185, which embraces "all territory and waters, continental or insular, subject to the jurisdiction of the United States."

Guantanamo is comparable to other strategic areas where the United States acquired complete jurisdiction and control without acquiring sovereignty over the underlying territory, such as the former Canal Zone in Panama, and the Trust Territory of the Pacific Islands.[16] During the period of United States jurisdiction over the Canal Zone, the courts treated it as equivalent

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[16] See Sedgwick W. Green, Applicability of American Laws to Overseas Areas Controlled by the United States, 68 Harv. L. Rev. 781, 792 (1955) (status of Guantanamo "in substance identical with that in the Canal Zone"); Law of the Sea and International Waterways: Canals, 1977 Digest of United States Practice in International Law § 7, at 593-94 (analogizing Canal Zone to Guantanamo). See also Huerta v. United States, 548 F.2d 343 (Ct. Cl.), cert. denied, 434 U.S. 828 (1977) (takings case involving alien's property on Guantanamo).

Guantanamo Bay Naval Base has a total area of over forty-five square miles, thirty-one of them on land. See Navy Office of Information, Statistical Information, U.S. Naval Base, Guantanamo Bay, Cuba (1985). Its land area is roughly the size of St. Thomas, V.I. (32 sq. mi.), and nearly half the size of the District of Columbia (70 sq. mi.).

to an unincorporated territory of the United States. See, e.g., Canal Zone v. Yanez P. (Pinto), 590 F.2d 1344 (5th Cir. 1979); Canal Zone v. Scott, 502 F.2d 566, 570 (5th Cir. 1974).

Months of residence in a refugee camp in such a territory, followed by forced repatriation, are a sufficient connection with the United States to make a refugee's fate a proper subject of judicial concern, notwithstanding the need for prudential standing rules to limit access to the federal courts. Bertrand and Remy are not any alien anywhere in the world. Petitioners initiated contact with them, prevented them from fleeing to any other country, and detained them in territory under the complete jurisdiction and control of the United States. Petitioners then forced them back to Haiti, and have announced that summary repatriation will follow if they try to flee again. The reasons for recognizing the standing of the Respondents in general apply with particular force to these Respondents. A federal court can determine the legality of Petitioners' actions at the request of such plaintiffs without becoming a forum for every disappointed visa applicant.

IV. PETITIONERS' VIOLATIONS OF THE INA ARE NOT UNREVIEWABLE FOREIGN POLICY OR MILITARY DETERMINATIONS OF THE PRESIDENT

The Government argues that the "nature of the administrative action involved" weighs against reviewability. Brief for Petitioners at 17. To the extent that the Government relies on the implications of immigration enforcement for foreign relations, much of this Court's body of precedents reviewing action by immigration officials refutes this contention. See, e.g., INS v. Doherty, 112 S. Ct. 719 (1992) (reviewing deportation of PIRA member to United Kingdom); INS v. Elias-Zacarias, 112 S. Ct. 812 (1992) (reviewing likelihood of persecution in Guatemala); Jean v. Nelson, 472 U.S. 846 (1985) (reviewing discrimination against Haitians in parole determinations).

The fact that §§ 212(f) and 215 of the INA, 8 U.S.C. §§ 1182(f), 1185, grant the President broad discretion to impose restrictions on the entry of aliens does not militate against the

reviewability of the Petitioners' actions. Respondents do not challenge a restriction on entry, but rather Petitioners' practice of unlawful forced repatriation of refugees captured on the high seas.

Nor do Respondents challenge a Presidential determination that entry of undocumented aliens would be detrimental to the interests of the United States. Indeed, as the Office of Legal Counsel recognized when the interdiction program was first adopted, suspension of entry under § 212(f) is wholly redundant, since it is being applied to aliens who are already excludable for lack of visas. Proposed Interdiction of Haitian Flag Vessels, 5 Op. Off. Legal Counsel 242, 244 (1981).

Even if Respondents were challenging a restriction on entry, conflicts between exercise of authority under §§ 212(f) and 215 and requirements imposed elsewhere by statute are not unreviewable. As the legislative history of the 1952 Act states, and as a comparison of the statutory language confirms, §§ 212(f) and 215 reenact the authority granted by the Passport Act of May 22, 1918, 55 Stat. 252, as amended, formerly codified at 22 U.S.C. § 223.[17] Case law between 1952 and 1981 is unavailable because, as the Office of Legal Counsel observed, "Neither this Office nor the Immigration and Naturalization Service (INS) is aware of any time when the power granted by this section, added in 1952, has been used." 5 Op. Off. Legal Counsel 242, 244 n.5 (1981).[18] Cases under the predecessor provision, however, did

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[17] See H.R. Rep. No. 1365, 82d Cong., 2d Sess. 53 (1952), reprinted in [1952] U.S. Code, Cong. & Ad. News 1708. The original restriction to times of war or declared national emergency was repealed in 1978. Pub. L. 95-426, § 707(a), 92 Stat. 992.

[18] Section 212(f) has been invoked subsequent to 1981 on four other occasions. Presidential Proclamation No. 5377, 50 Fed. Reg. 41,329 (1985); Presidential Proclamation No. 5517, 51 Fed. Reg. 30,470 (1986); Presidential Proclamation No. 5829, 53 Fed. Reg. 22,289 (1988); Presidential Proclamation No. 5887, 53 Fed. Reg. 43,185 (1988). Unlike the Haitian interdiction program, none of these Proclamations did anything other than declare ineligible for entry certain categories of aliens who might otherwise have been admissible.

measure restrictions adopted pursuant to its authority against congressional limitations of executive power. See United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544-47 (1950); Johnson v. Keating ex rel. Tarantino, 17 F.2d 50 (1st Cir. 1926). And the Seventh Circuit has held that a departure control order issued against a child under § 215 violated the constitutional rights of his parents, who had already returned to the Soviet Union. Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985).

Moreover, the Petitioners are engaging in unlawful repatriation on their own authority, not under the direction of the President's Order. That Order superseded the express requirement of nonreturn of refugees contained in the original Executive Order establishing the Haitian interdiction program, but it purports to leaves refugee screening to Petitioners' discretion.[19] This case is therefore entirely unlike Franklin v. Massachusetts, 112 S. Ct. 2767 (1992), where the Court denied the availability of APA review of a discretionary function carried out directly by the President, or United States v. George S. Bush & Co., 310 U.S. 371 (1940), a pre-APA case in which the Court denied the availability of review of the President's exercise of judgment in proclaiming a tariff, so long as "the President acted in full conformity with the statute." 310 U.S. at 380.

Nor does this case become one of a military nature merely because the President has involved the Coast Guard in the enforcement of the immigration laws. This Court has long recognized the regulation of immigration as a plenary power of Congress, not of the President. Indeed, some of the seminal precedents specifically characterize regulation of immigration as regulation of foreign commerce. See Head Money Cases, 112 U.S. 581, 591 (1884); Henderson v. Mayor of New York, 95

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[19] Petitioners assert that the Coast Guard has instructed its officers to apply an "immediate and exceptionally grave physical danger" standard for giving temporary refuge. Brief for Petitioners at 7 n.5. While this heightened standard is clearly inconsistent with Petitioners' statutory and treaty obligations, it underscores the fact that the President's order does not forbid the Petitioners to comply with § 243(h).

U.S. 259, 270-71 (1876); Passenger Cases, 48 U.S. (7 How.) 283, 405 (1849) (opinion of McLean, J.). Nowhere has this Court suggested that the President has a superior power over immigration that authorizes him to set aside statutory restrictions. A fortiori, the President cannot delegate to Petitioners the authority to violate the statute. See also 14 U.S.C. § 89(b) (Coast Guard subject to same limits as other law enforcement agents).

CONCLUSION

For the foregoing reasons, this Court should conclude that Respondents had standing to seek judicial review of Petitioners' actions, and should reach the merits of the case. While Amici have only presented argument relating to the issue of the availability of judicial review, Amici believe that the decision of the United States Court of Appeals for the Second Circuit was correct on the merits as well. Accordingly, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1992

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,
Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-344

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,
Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

The Office of the United Nations High Commissioner for Refugees ("UNHCR" or "High Commissioner") is charged by the United Nations General Assembly with the responsibilities of providing international protection to refugees and of seeking permanent solutions to the problems of refugees.[1]

The Statute of the Office of the High Commissioner specifies that the High Commissioner shall provide for the protection of refugees by, *inter alia*, "[p]romoting

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[1] *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428(V), U.N. GAOR, Supp. No. 20, Annex, ¶ 1, U.N. Doc. A/428 (1950).

the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto."[2] The supervisory responsibility of UNHCR is formally recognized in the 1967 Protocol Relating to the Status of Refugees, 19 U.S.T. 6223 ("1967 Protocol" or "Protocol"), which provides that:

> The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner on Refugees . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.[3]

The views of UNHCR are informed by over 40 years of experience supervising the treaty-based system of refugee protection established by the international community. UNHCR provides international protection and direct assistance to refugees throughout the world and has representatives in over 80 countries. It has twice received the Nobel Peace Prize, in 1954 and 1981, for its work on behalf of refugees.

The present case involves the interpretation of the 1951 Convention Relating to the Status of Refugees, 19 U.S.T. 6259 ("1951 Convention" or "Convention"), and the 1967 Protocol, multilateral treaties whose application the High Commissioner is expressly mandated to supervise. Article 33 of the 1951 Convention expresses the fundamental minimum protection owed to refugees, namely that they shall not be sent back, in any way whatsoever, to a place where their lives or freedom would be threatened; it is the cornerstone of international efforts to protect refugees. This Court's interpretation of this fundamental safeguard may well influence, for years to come, the behavior of other countries and thus the fates of untold numbers of refugees throughout the world. Accordingly, this case implicates the vital interests of the High Commissioner.

[2] *Id.* ¶ 8(a).

[3] 1967 Protocol, art. II, ¶ 1.

SUMMARY OF ARGUMENT

Amicus curiae respectfully urges the Court to affirm the decision of the United States Court of Appeals for the Second Circuit striking down the Executive Branch's policy of blocking the flight of Haitian refugees and returning them against their will to the country from which they fled. This policy of summarily repatriating Haitian refugees whose lives or freedom would be threatened in Haiti is contrary to the terms of the 1951 Convention and the internationally recognized principle of *non-refoulement* set forth in Article 33.

By its plain terms, Article 33 prohibits the involuntary return of refugees "in any manner whatsoever" to the frontiers of territories where their lives or freedom would be threatened, whether or not those refugees are eligible for asylum. The protection of Article 33 is available as soon as an individual satisfies the criteria provided in the definition of "refugee," regardless of whether the refugee has been formally recognized as such by a State or international organization. Article 33 makes no exceptions for State conduct that occurs outside the territory or territorial waters of the contracting State. Rather, the obligations which it imposes arise wherever a State acts.

This plain meaning is confirmed by the structure of the treaty, which sets forth territorial limitations in other articles but includes no such limitation in paragraph 1 of Article 33, and by the treaty's broad and overriding humanitarian purpose, which is to protect an especially vulnerable group from persecution. Article 33's plain meaning is further confirmed by the United States' own prior practice under the Convention and Protocol, and by other international agreements, practices and norms, all of which reflect an international understanding that this fundamental protection afforded refugees is not

limited by State borders. Finally, the negotiating history of the treaty upon which petitioners rely does not support their conclusion that intercepting refugees on the high seas and forcibly repatriating them is permissible under the Convention, Protocol, and international law. To the contrary, the treaty's *travaux preparatoires* indicate that the drafters understood the term "*non-refoulement*" to proscribe State conduct both within and outside of a State's territories.

ARGUMENT

I. THE INVOLUNTARY RETURN OF HAITIAN REFUGEES WHOSE LIVES OR LIBERTY WOULD BE THREATENED IN THEIR COUNTRY IS PLAINLY PROSCRIBED BY ARTICLE 33 OF THE 1951 CONVENTION.

Article 33 of the 1951 Convention lies at the heart of this dispute and is central to its resolution. In 1968, the United States acceded without reservation to the 1967 Protocol, which incorporated by reference the substantive provisions of the 1951 Convention. Article 33 of the Convention states:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

1951 Convention, art. 33(1). The Convention, in turn, defines a "refugee" as any person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion," is unable or unwilling to return to his or her country of origin or former habitual residence. 1951 Convention, art. 1(A)(2).[4] Thus, under Article 33, refugees whose lives or freedom would be

[4] The 1967 Protocol incorporates this definition, but eliminates certain temporal and geographic restrictions included in the 1951 Convention. 1967 Protocol, art. I(2)-(3). The 1967 Protocol's definition was the basis for the definition of "refugee" in the 1980 Refugee Act. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 437 (1987).

threatened in their country of origin may not be returned against their will.

The treaty's language is broad and unequivocal. It prohibits both the expulsion of a refugee *from* a contracting State and, of critical importance here, the return of a refugee *to* a territory where his or her life or freedom would be endangered. As the Second Circuit explained below, the term "return" necessarily looks to the place "to" which a refugee is returned.[5] The word "expel," by contrast, refers to the treatment of refugees present in a State's territory, since, by definition, refugees cannot be expelled from a country in which they are not present.[6] Thus, as the court below correctly recognized, by its plain terms Article 33 announces two broad proscriptions. The second, known as *non-refoulement* or non-return, bars "in any manner whatsoever" the involuntary repatriation of refugees to a place where their lives or freedom would be threatened.[7]

The plain meaning of Article 33 is controlling here. As this Court has consistently recognized, when treaty "interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation." *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982). See also

[5] See *Webster's Third New International Dictionary* 1941 (1971) (return means "to bring, send, or put (a person or thing) back to or in a former position").

[6] See *Webster's*, *supra*, at 799 (expel means "to drive away from a place or country: compel to leave").

[7] The term "*non-refoulement*" is also frequently used in its broadest sense to refer to both proscriptions collectively: that refugees must not be sent back to a place where their lives or freedom would be threatened regardless of whether the State first encounters the refugee inside or outside its own territory.

United States v. *Stuart*, 489 U.S. 353, 371 (1989) (Scalia, J., concurring) (if "the Treaty's language resolves the issue presented, there is no necessity of looking further to discover 'the intent of the Treaty parties' "); *id.* at 370 (Kennedy, J., concurring) (same).[8] Here, Article 33's flat prohibition against returning refugees plainly proscribes the government's current policy of intercepting Haitian refugees on the high seas and forcibly returning them to Haiti.

This principle is at the very heart of international refugee law and amounts to a minimal form of protection for those who flee persecution. The United States formally accepted that principle when it acceded to the Protocol in 1968; indeed both the Protocol and the Convention by their express terms prohibited any reservation to Article 33,[9] and the United States did not purport to lodge any.[10]

[8] This recognition is fully consistent with well-settled principles of international law. Article 31 of the Vienna Convention on the Law of Treaties provides that "the ordinary meaning" of treaty terms in their context, and in light of the object and purpose of the treaty, control its interpretation. 1155 U.N.T.S. 331, U.N. Doc. A/Conf. 39/27 (1969) ("Vienna Convention"). Although the United States has signed but not ratified the Vienna Convention, the Department of State, in submitting this treaty for ratification for the Senate, stated that the Convention "is already recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc. L, 92d Cong., 1st Sess. 1 (1971).

See also *Restatement (Third) of Foreign Relations Law of the United States* § 325(1) (1987) ("*Restatement*") ("An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose").

[9] Article 42(1) of the Convention states that "[a]t the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to Articles 1, 3, 4, 16(1), 33, 36-46 inclusive." Article VII(1) of the Protocol provides that States may make reservations to articles of the Convention "other than those contained in Articles 1, 3, 4, 16(1) and 33."

[10] Altogether, one hundred and fifteen nations have adopted either the 1951 Convention or the 1967 Protocol, or both. Of the numerous reservations registered by the parties to these agreements, none has purported to weaken the protection of Article 33.

Article 33 guarantees refugees a specific, fundamental protection, irrespective of the grant of asylum. The benefit of this protection extends to refugees the moment they satisfy the criteria for refugee status. As the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* ¶ 28 (1992) explains:

> A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils [sic] the criteria contained in the definition. This would necessarily occur *prior to the time at which his refugee status is formally determined.* Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

Id. (emphasis added).[11] See also *Vigile* v. *Sava*, 535 F. Supp. 1002, 1019 (S.D.N.Y.) (the term "'[r]efugee' is a self-imposed label, not one requiring the imprimatur of the INS"), *rev'd on other grounds*, 684 F.2d 204 (2d Cir. 1982). Thus, elimination of a formal screening process by Executive Order 12,807[12] does not absolve

[11] The UNHCR Handbook was prepared at the request of the Executive Committee of the High Commissioner's Programme, a body comprised of government representatives from 46 nations including the United States, to provide guidance in applying the terms of the Convention and Protocol. The learning in the Handbook is based on UNHCR's experience, the practice of States in determining refugee status, and the literature devoted to the subject over the years. The Handbook has been widely cited in judicial decisions. See, *e.g.*, *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) ("[T]he Handbook provides significant guidance in construing the Protocol . . . [and] in giving content to the obligations that the Protocol establishes"). Its recommendations have been viewed by several governments as "obligatory." A. King, *Interdiction: The United States' Continuing Violation of International Law*, 68 B.U. L. Rev. 773, 798-800 (1988) (examining practice of countries which follow Handbook's recommendations).

[12] 57 Fed. Reg. 23,133 (1992).

the United States of its obligation not to return Haitian refugees.

II. ARTICLE 33 OF THE 1951 CONVENTION IS NOT AMBIGUOUS.

A. The Text, Structure And Purpose Of Article 33 Demonstrate That The Treaty Unambiguously Prohibits The Return Of Refugees To A Territory In Which Their Safety Or Freedom Is Threatened.

In order to escape the plain meaning of Article 33, petitioners attempt to create ambiguity where none exists. According to petitioners, the parenthetical inclusion of the French term "*refouler*" immediately following the English term "return" clouds the plain meaning of the latter and limits its otherwise broad reach. This is so, petitioners claim, because *one* French dictionary includes "expel (aliens)" as one of several definitions of "*refouler*." Brief for the Petitioners ("U.S. Br.") at 38-39. Seizing on this relatively limited usage and its "connot[ation]s" (*id.* at 39), petitioners contend that Article 33 is best read as "express[ing] an essentially unitary prohibition against removal of a refugee from the 'Contracting State' to a foreign territory." *Id.* at 38 (emphasis deleted).

Although this Court frequently relies on dictionary definitions to confirm the plain meaning of statutory and other legal terms, no sensible principle of treaty or statutory construction supports the use of uncommon definitions to create ambiguity in otherwise clear treaty language. French dictionaries, including the one on which the government relies, define "*refouler*" as "to drive back" or "to repulse."[13] By contrast, some French dictionaries do not even include the definition petitioner cites.[14] Petitioners' preferred construction of the treaty

[13] See *Collins Robert French Dictionary* 558 (1978); *Cassell's French Dictionary* 627 (1978); M. Dubois, *Dictionaire Larousse* 631 (1981).

[14] See, *e.g.*, *Collins Robert French Dictionary*, *supra*, at 558.

simply ignores the fundamental principle that treaty terms are to be interpreted in light of their *ordinary* meaning. See *Sumitomo*, 457 U.S. at 180; Vienna Convention, art. 31.[15]

Perhaps more significantly, petitioners' construction ignores the fact that, at the time Article 33 was written, the term "*refoulement*" encompassed not only "ejection," but also interception and rejection from *outside* the territory.[16] The French delegate to the Convention's drafting committee, the Ad Hoc Committee on Statelessness, explained that "[i]n France and Belgium . . . *refoulement* meant either deportation as a police measure or *non-admittance at the frontier*." Ad Hoc Committee on Statelessness and Related Problems, *Summary Record of the Twenty-First Meeting* 4-5, U.N. Doc. E/AC.32/SR.21 (1950) (emphasis added). The Belgian delegate "agreed with that explanation," leading the British delegate to "conclude[] from the discussion that the notion of 'refoulement' could apply to . . . refugees seeking admission." *Id.* at 5.[17]

[15] Petitioners contend that the definition upon which they rely supplies the most appropriate meaning because it is the only definition that "specifically relate[s] to the subject of this case." U.S. Br. at 40 n.25. This contention is incorrect. The *Collins Robert French Dictionary*, for example, specifically defines "*refouler*" in connection with immigrants and foreigners ("*immigrant, etranger*") as "to drive back." *Id.* at 558. More fundamentally, petitioners' reliance on a definition pertaining to "aliens" simply begs the question at issue here. Unlike other articles of the 1951 Convention, which specifically refer to a refugee's status as an alien where that status is relevant (see, *e.g.*, 1951 Convention, art. 18), Article 33 refers only to "refugees," not "aliens." Thus, the specialized and relatively obscure definition upon which the government relies does not speak most directly to the circumstances of the case.

[16] Cf. *Eastern Airlines, Inc.* v. *Floyd*, 111 S. Ct. 1489, 1495 (1991) (relying on a contemporaneous understanding in France of a French term used in 1929 Warsaw Convention).

[17] Nehemiah Robinson, the commentator petitioners cite extensively in their brief, likewise recognized that "there was agree-

Moreover, the definition of "*refouler*" upon which the government relies to render the term "return" ambiguous simultaneously renders it redundant. Under petitioner's reading, the phrase "expel or return" is transformed into "expel or expel." The government's attempt to explain away this incongruity fails on its own terms. Even if "*refouler*" "connotes . . . physical relocation" (U.S. Br. at 39), it would necessarily encompass *all* forms of physical relocation, whether effectuated through the formal process of expulsion or directly from the high seas with no procedure whatsoever.[18] Thus, the redundancy in petitioners' interpretation of the treaty is inescapable.[19]

Nor can petitioners' restrictive reading of "return" be reconciled with the language that follows it. Article 33

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ment in the Ad Hoc Committee that *refoulement*, existing in Belgium and France and unknown elsewhere, means either deportation as a police measure or *non-admission at the frontier*." N. Robinson, *Convention Relating to the Status of Refugees: The History, Contents and Interpretation* 162 (1953) (emphasis added) ("Robinson"). Robinson makes no attempt to reconcile this recognition with his subsequent conclusion that Article 33 applies only to refugees who have been admitted to a State. This failure completely undermines the government's reliance on his conclusions.

[18] Indeed, while petitioners rely on Goodwin-Gill for their assertedly narrow definition of "*refoulement*," Goodwin-Gill explains in the very passage petitioners cite that "*refoulement*" covers "summary reconduction to the frontier of those discovered to have entered illegally *and summary refusal of admission*." G. Goodwin-Gill, *The Refugee in International Law* 69 (1983) (emphasis added).

[19] By contrast, construing the term "return" according to its plain meaning does not render the term "expel" redundant. In certain circumstances, expulsion might not lead immediately to the repatriation of a refugee, but repatriation might nevertheless be both foreseeable and inevitable because the country to which the refugee was expelled would in turn repatriate the refugee. Without the prohibition against expulsion, a contracting State could claim that, because it had not returned the refugee directly to his or her country of origin, it had not violated the treaty. The term "expel" closes this potential loophole.

prohibits the return of refugees "in any manner whatsoever" to a place where their lives or freedom would be endangered. Yet, as petitioners read the treaty, a contracting State may return refugees in any number of ways—by, for example, intercepting them on the high seas, or even in the territory or territorial waters of another State. Thus, under petitioners' reading, while the treaty purports to prohibit the return of refugees "in any manner whatsoever," it actually excepts from this sweeping language all forms of return that do not entail removal of the refugee from the territory of the contracting State.

That the treaty does not create any such exception is made plain by comparing Article 33 with other articles of the Convention that do limit territorially the application of the protections they provide. Where the contracting parties intended the safeguards of the Convention to be dependent on a refugee's presence or residence, they stated so explicitly in the language of the Convention. See 1951 Convention, arts. 2, 4, 27 (simple presence); 18, 26, 32 (lawful presence); 15, 17(1), 19, 21, 23, 24, 28 (lawful residence). In contrast, Article 33 expresses its mandate in clear terms without any geographical limitation. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 429 (1987) (the Convention "imposed a mandatory duty on contracting States not to *return* an alien to a country where his 'life or freedom would be threatened' on account of one of the enumerated reasons") (citation omitted) (emphasis added).

As is true of statutes, the specification of an exception in a treaty precludes judicial implication of any additional exceptions. As the Court explained in its analysis of another treaty:

> [T]reaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the

> high contracting parties. Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms.

Rocca v. *Thompson*, 223 U.S. 317, 332 (1912). Because the drafters of the 1951 Convention were clearly able and willing to limit the geographical applicability of other protections, there is no basis for reading such a limitation into Article 33.[20] This is particularly true in view of the fact that, as previously noted, the 1951 Convention and the 1967 Protocol expressly prohibit States from adopting *any* reservation to Article 33 when signing or acceding to these treaties. See note 9, *supra*.

Finally, petitioners' restrictive reading is plainly at odds with the broad remedial and humanitarian goals of the treaty. As this Court has long recognized, "[t]reaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." *Asakura* v. *City of Seattle*, 265 U.S. 332, 342 (1924). This tenet of treaty interpretation applies with particular force to the 1951 Convention, the overriding purpose of which was to safeguard the rights of a special, vulnerable group in need of protection. Indeed, the preamble to the Convention notes that it was adopted in order "to assure refugees the *widest possible* exercise of these *fundamental* rights and freedoms." 1951 Convention, preamble (emphasis added).

Petitioners' interpretation of Articles 33 is not only "restrictive of rights," it extinguishes the most basic

[20] Contrary to petitioners' assertion (U.S. Br. at 40-41), paragraph 2 of Article 33 does not provide a basis for such a limitation. Indeed, the very fact that paragraph 2 contains a territorial limitation, while paragraph 1 does not, demonstrates that the drafters did not intend to limit the scope of paragraph 1.

right enshrined in the treaty—the right of non-return—for an entire class of refugees, those who have fled their own countries but have not yet entered the territory of another State. Under petitioners' reading, the availability of the most fundamental protection afforded refuges turns not on the refugee's need for protection, but on his or her own ability to enter clandestinely the territory of another country. The government's interpretation, moreover, is a complete aberration in—and indeed, if upheld, could result in a significant setback to—over 40 years of development in international refugee protection. No State other than the United States has, to UNHCR's knowledge, resorted to the implementation of a formal policy of intercepting refugees on the high seas and repatriating them against their will. This fact itself confirms the international understanding that Article 33 prohibits such conduct.

B. The Past Practice Of The United States Is Consistent With, And Confirms The Plain Meaning Of, Article 33's Proscription Of Non-Return.

The United States' past practice under the treaty is inconsistent with its current interpretation of Article 33 and belies its claim that the treaty is ambiguous.[21] Indeed, the government's current policy represents a recent and marked reversal of the Executive's prior determination that the 1967 Protocol governs conduct beyond a contracting State's territory. Thus, the 1981 bilateral

[21] See *United States* v. *Stuart*, 489 U.S. 353, 369 (1989) ("The practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed"); *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 260 (1984) ("The conduct of the contracting parties in implementing [a treaty] in the first 50 years of its operation cannot be ignored"); see also Vienna Convention, art. 31(3)(b) (in treaty interpretation, courts can consider "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation").

executive agreement between the United States and Haiti expressly acknowledged that, "with respect to vessels on the high seas," the United States was bound by "international obligations mandated in the Protocol Relating to the Status of Refugees." [22] For more than ten years, the Executive Order implementing this bilateral agreement explicitly provided that "no person who is a refugee will be returned without his consent." [23] See Office of U.S. Department of State Legal Advisor, Letter from Edwin D. Williamson to Timothy E. Flanigan (Dec. 11, 1991) (discussing shift from earlier legal opinions of the Office of Legal Counsel to current practice).[24]

This recognition was fully consistent with the United States' traditionally staunch defense of international refugee protection in general, and the universal application of the principle of non-return in particular. In a 1974 statement to the Third Committee of the United Nations General Assembly, U.S. Ambassador Clyde Ferguson stated:

> It is difficult to overemphasize the significance to refugees of ensuring liberal asylum policies and practices, and above all in making certain that no refugee is required *to return to any country where he would face persecution.*
>
> . . . .
>
> The [UN] High Commissioner . . . has deplored the fact that during the past year certain countries have repatriated refugees involuntarily, directly contrary . . . to Article 33 of the Refugee Convention.

[22] Agreement Effected by Exchange of Notes, Sept. 23, 1981, T.I.A.S. No. 10,241.

[23] Executive Order No. 12,324, 46 Fed. Reg. 48,109.

[24] Petitioners' strenuous efforts to disparage this earlier interpretation of the treaty (U.S. Br. at 50 n.40) do not alter the fact that the prior interpretation likewise represented the views of that branch of the government charged with the conduct of United States' foreign policy.

> *My government joins with the High Commissioner in condemning the inhumane practice of refoulement.* The principle that refugees must not be repatriated against their will, and the right of a refugee to seek and secure asylum, have become even more firmly embedded in international law.[25]

More recently, then Deputy Secretary of State Lawrence S. Eagleburger stated in his address to the International Conference of Indochinese Refugees on June 13, 1989: "[T]he United States will remain unalterably opposed to the forced repatriation of Vietnamese *asylum-seekers.* We will not consider forced repatriation as falling within the rubric of 'acceptable under international practices.' " [26]

The United States' respect for Article 33's prohibition against the return of refugees also can be discerned from the 1980 amendments to the Immigration and Nationality Act ("INA"), which were passed in order to conform United States law to the 1951 Convention and the 1967 Protocol.[27] The 1980 Refugee Act amended the INA

[25] *Reprinted in* A. Rovine, *Digest of United States Practice in International Law 1974* 111 (Office of the Legal Advisor, Department of State, 1975) (emphasis added).

[26] "For the Record," *Washington Post*, July 6, 1989, at A16 (emphasis added).

In the context of the long-standing exodus of boat people in Southeast Asia, the United States government proposed a response even more generous than the minimum protection of non-return. See M. Nash, *Digest of United States Practice in International Law 1979* 403 (Office of the Legal Advisor, Department of State, 1983) (remarks of U.S. Ambassador Richard Clark) (urging Southeast Asian states to offer asylum, and, in any event, "not to refuse admission to 'boat refugees' ").

[27] See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) ("if one thing is clear from the legislative history of . . . the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees."); see also

to prohibit the "*return* [of] any alien . . . *to* a country" when certain conditions are satisfied.[28] This change is strong evidence that Congress and the President understood the 1951 Convention to prohibit the return of refugees to a place where their safety or freedom would be threatened. It provides no support for petitioners' contention that Congress understood Article 33 to proscribe only the "removal" or "summary reconduction" of refugees—terms that appear in neither the treaty nor the statute.

C. The Customary Obligation Of Non-Return Confirms The Plain Meaning Of Article 33.

The decisions of this Court, as well as Article 31 of the Vienna Convention, require that the 1951 Convention be interpreted consistently with international law. In this case, petitioners' interpretation of Article 33 ignores the customary norm of non-return which, as understood by other international agreements and practice, applies wherever a State encounters refugees.[29]

INS v. *Doherty*, 112 S. Ct. 719, 729 (1992) (Scalia, J., concurring); *INS* v. *Stevic*, 467 U.S. 407, 421 (1984).

[28] Section 243(h), as amended in 1980, now reads:

> (h) Withholding of deportation or return (1) The Attorney General shall not deport *or return* any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1253(h) (Supp. 1992) (emphasis added).

[29] Customary international law "results from a general and consistent practice of states followed by them out of a sense of legal obligation." *Restatement*, at § 102, comment b, § 111. The pertinent State practice is reflected in treaties, national constitutions, declarations, and resolutions of intergovernmental bodies, public pronouncements by heads of state, and empirical evidence of the extent to which the customary norm is observed. See *The Paquete Habana*, 175 U.S. 677 (1900); *North Sea Continental Shelf Cases*, 1969 I.C.J. 37. Customary international law is binding on all nations and, as "part of our [U.S.] law," *Paquete Habana*, 175 U.S. at 700, creates enforceable rights and obligations for individuals in U.S. courts. *Id.*

This norm is reflected in two treaties drafted not long after the 1967 Protocol. Article 22(8) of the 1969 American Convention on Human Rights[30] requires that no alien be "deported or returned to a country" where his right to life or personal freedom is in danger of being violated. Article II(3) of the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45, states that "[n]o person shall be subjected . . . to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened." Neither of these agreements places territorial restrictions on a government's obligation of non-return, and neither has been interpreted, even by reservation, to allow such restrictions.

The Cartagena Declaration on Refugees (Cartagena de Indias, Nov. 22, 1984), which was formulated and endorsed by a number of Latin American States, likewise reflects this norm. The Colloquium that adopted the Declaration unanimously concluded that the principle of *non-refoulement* was "imperative in regard to refugees and in the present state of international law should be acknowledged and observed as rule of *jus cogens*."[31] See 1985 Report of the United Nations High Commissioner for Refugees, U.N. Doc. E/1985/62 (1985), at 6-7, ¶ 23 (quoting Colloquium on the International Protection of

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[30] OAS Official Records, OEA/Ser.K/XVI/1.1.

[31] In international law, *jus cogens* refers to a norm "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention, art. 53.

Refugees in Central America, Panama and Mexico). As recently as 1991, the Organization of American States ("OAS") General Assembly, which includes the government of the United States, reiterated its endorsement of the Cartegena Declaration. See 1991 Legal Resolution of Situation of Refugees, Repatriated and Displaced Persons in the American Hemisphere, AG/RES. 1103 (XXI-0/91) (June 7, 1991).

Moreover, at the 1980 session of the UNHCR Executive Committee, the delegate of the United States discussed the problems of refugees at sea and "endorsed the . . . conclusion[] . . . that *non-refoulement* should be considered a principle of international law." Thirty-First Session of the Executive Committee of the High Commissioner's Programme, 10, U.N. Doc. A/AC.96 SR.322 (1980). The United States' view was part of the clear trend in international law that, in 1985, led the High Comissioner to observe that the principle of non-return had crystallized to the status of *jus cogens*. 1985 Report of the United Nations High Commissioner for Refugees, *supra*, at ¶¶ 22-23. Describing the principle of *non-refoulement* as a "peremptory norm of international law," the High Commissioner reported to the United Nations General Assembly that this norm is not governed by geographical or territorial limitations. *Id.* at ¶22 (noting that the "principle requires that no person shall be subject to such measures as rejection at the frontier").[32]

International law also prohibits extraterritorial acts that violate other rights regarded as fundamental. For example, the United Nations Human Rights Committee has held that a State party may be accountable under Article 2 (1) of the 1966 International Covenant on Civil and Political Rights[33] for violations of the rights therein recognized committed by its agents in the territory of another State, whether with or without the acquiescence of the government of that State.[34] The Committee determined that the qualification "subject to its jurisdiction," contained in Article 2(1) of the Covenant, does not refer to the place where the violation occurs, but to the relationship between the individual and the State concerned.[35] To like effect, the European Commission on Human Rights has concluded that States' obligations under the European Convention on Human Rights extend to "all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad."[36]

The customary international law rule of non-return reflects a judgment by the international community that the obligations of a State with respect to such a fundamental right cannot stop at the State's borders.[37] The

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[32] See also L. Sohn & T. Buergenthal, *The Movement of Persons Across Borders* 123 (1992) ("The general prohibition against a State's return of a refugee to a country where his or her life would be threatened . . . has become a rule of customary international law"); G. Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, 26 Va. J. Int'l L. 899, 902 (1986) ("The binding obligations associated with the principle of *non-refoulement* are derived from conventional and customary international law").

[33] G.A. Res. 2200A, U.N. GAOR, Supp. No. 16, Annex (1966). The United States signed the 1966 Covenant in 1977 and acceded to it in June 1992.

[34] Article 2(1) specifies that states will "respect and . . . ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . ."

[35] See P. Sieghart, *The International Law of Human Rights* 58 (1983).

[36] Sieghart, *supra*, at 58 (citation omitted).

[37] A parallel approach can be found in U.S. domestic law, where it is common for obligations of the sovereign to arise wherever the sovereign acts and not merely at the territorial borders. See *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272-73 (1973); *United States* v. *Hidalgo-Gato*, 703 F.2d 1267 (11th Cir. 1983).

obligation not to return a refugee arises wherever the government encounters the individual refugee, irrespective of whether that government waits for the refugee to arrive at the border or intercepts him or her on the high seas. For this reason, the Executive Committee of UNHCR, which is comprised of 46 nations, including the United States, has passed numerous guidelines for the protection of refugees on the high seas.[38] These guidelines recognize that the bedrock protections of Article 33 extend to international waters, and thus beyond the borders of any particular State.

These international agreements and interpretations support and confirm the extraterritorial applicability of the fundamental duty of non-return.[39] If, as the government contends, Article 33 was limited to actions occurring

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[38] See UNHCR, *Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme*, HCR/IP/2 (1986), Executive Committee Conclusions, No. 23 (XXXII) Problems Related to the Rescue of Asylum Seekers in Distress at Sea, ¶ 3 (1981) (practice of disembarking persons rescued at sea at next port of call "should also be applied in the case of asylum seekers rescued at sea"); No. 21 (XXXII) General, ¶ (g) (1981) (calling for "intensification of efforts to protect refugees from acts of violence at sea"); No. 20 (XXXI) Protection of Asylum-Seekers at Sea, ¶ (b) (1980) (recommending measures to prevent "criminal attacks on asylum-seekers at sea.").

[39] This basic principle of *non-refoulement* has been reaffirmed every year by the Executive Committee of the UNHCR Programme. See, *e.g.*, *Conclusions on the International Protection of Refugees*, *supra*, Executive Committee Conclusions No. 41 (XXXVII) General, ¶(j) (1986); No. 36 (XXXVI) General, ¶(f) (1985); No. 33 (XXXV) General, ¶(c) (1984); No. 29 (XXXIV) General, ¶(c) (1983); No. 25 (XXXIII) General, ¶(b) (1982); No. 21 (XXXII) General, ¶(f) (1981); No. 17 (XXXI) Problems of Extradition Affecting Refugees, ¶(b) (1980); No. 15 (XXX) Refugees Without an Asylum Country, ¶(b) (1979); No. 11 (XXIX) General, ¶(c) (1978); No. 6 (XXVII) Non-refoulement, ¶(c) (1977).

within a contracting State, this limitation should have been incorporated in subsequent hemispheric agreements and should have influenced the interpretive rulings construing comparable protections. Instead, this evidence demonstrates that the fundamental protection embodied in Article 33 is available wherever needed, and, thus, that Article 33 governs the behavior of contracting States wherever they may act.[40]

D. Article 40 Does Not Limit The Scope Of Article 33 To A State's Own Borders.

Petitioners contend that Article 40, the so-called "territorial application clause," limits a contracting State's

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[40] Petitioners mistakenly suggest that the draft Convention on Territorial Asylum demonstrates that Article 33 does not apply extraterritorially. U.S. Br. at 47-48. This argument reflects a fundamental misunderstanding concerning the difference between asylum and *non-refoulement*. Asylum can only be obtained by persons who are already within a State's territory. That asylum thus has a territorial aspect is neither surprising nor relevant to the scope of the principle of *non-refoulement*, which does not address a refugee's right to seek asylum (*i.e.*, to remain and be protected within an asylum country, whether temporarily or permanently), but rather the absolute right not to be returned to a place of persecution. It was precisely because international law only guaranteed refugees the right not to be returned that the U.N. General Assembly sought to convene a conference aimed at crafting a permanent solution to the problems of refugees in the form of a right to asylum.

This same confusion is reflected in the works of the commentators cited by petitioners. See, *e.g.*, S. Aga Khan, *Legal Problems Relating to Refugees and Displaced Persons*, 149 Recueil des Cours (Hague Academy of International Law) 318 (1976) (discussing *non-refoulement* within the context of the Convention's failure "to mention *asylum* as a right") (emphasis added); 2 A. Grahl-Madsen, *The Status of Refugees in International Law* 94 (1972) (discussing *non-refoulement* in a chapter entitled "A Right to be Granted Asylum?"). These comments likewise led Judge Edwards erroneously to conclude that Article 33 does not apply to refugees on the high seas because "the ideal of *unconditional asylum* was diluted by the need for other practical guarantees." *Haitian Refugee Center* v. *Gracey*, 809 F.2d 794, 841 (D.C. Cir. 1987) (Edwards, J., concurring in part and dissenting in part) (emphasis added).

obligations under Article 33 to the State's borders. U.S. Br. at 41. In fact, the United States has long taken the view that despite the inclusion of territorial application clauses in various treaties, "*the application of a treaty is not necessarily confined to the territory of a party.*" [41]

Article 40 is largely an anachronism reflecting the common colonial relationships still existing in 1951. At the time the Convention was drafted, territorial clauses, or "colonial clauses" [42] as they were then called, were frequently included in treaties because many of the colonial powers lacked clear sovereignty over their dependent territories. There was also disagreement among the colonial powers as to whether treaties to which they acceded automatically extended to their dependent holdings without the assent of the local colonial governments. Consequently, a practice was established of including in treaties a clause permitting States to extend affirmatively the Convention to territories over which they had control. Consistent with this practice, paragraph 3 of Article 40 refers to extension of the Convention to territories where "the consent of the governments of such [colonial] territories" might be required.[43]

As discussed above, the Convention contains some articles that are intended to have effect only where certain physical presence or legal status requirements are satisfied. The territorial application clause in Article 40 therefore clarifies the scope of the word "territory" in,

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[41] *Yearbook of the International Law Commission 1966*, vol. II, U.N. Doc. A/CN.4/SER.A/1966/Add.1 (1967), at 65 (statement of United States representative) (emphasis added).

[42] See *Report of the Ad Hoc Committee on Refugees and Stateless Persons*, U.N. Doc. E/1850, E/AC. 32/8 (1950), at 28.

[43] The *travaux preparatoires* of the Convention confirm that this was the purpose of Article 40. U.N. Doc. A/Conf.2/SR.27 (1951) at 7-10; see also Robinson, *supra*, at 171 ("Par. 1 permits variations in the geographical application but only insofar as dependent territories are concerned").

for example, Article 15 (right of association), Article 17 (wage-earning employment), and Article 21 (housing). However, the territorial application clause has no relevance to provisions, such as Article 33, that do not include the word "territory."

III. THE NEGOTIATING HISTORY OF ARTICLE 33 DOES NOT DEMONSTRATE THAT THE TREATY PERMITS STATES TO INTERCEPT REFUGEES ON THE HIGH SEAS AND REPATRIATE THEM AGAINST THEIR WILL.

Petitioners also rely on a statement by the Netherlands' delegate at the Convention's negotiating conference, the Conference of Plenipotentiaries, as support for their contention that Article 33 does not apply extraterritorially. This reliance is misplaced for two reasons. First, the isolated statement of a delegate to the Convention cannot be used to alter the plain meaning of the treaty itself. Second, placed in its proper context, the Dutch delegate's comment does not demonstrate that Article 33 applies only to refugees who are already present within a State.

Because the plain meaning of Article 33 clearly precludes the forced repatriation of refugees, "there is no necessity of looking further to discover 'the intent of the Treaty parties.'" *United States* v. *Stuart*, 489 U.S. 353, 371 (1989) (Scalia, J., concurring); *id.* at 370 (Kennedy, J., concurring) (same).[44] Reliance on a treaty's negotiating history, or its *travaux preparatoires*, is appropriate only where the terms of the document are obscure or lead to "manifestly absurd or unreasonable"

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[44] See also *Case of the S.S. "Lotus,"* P.C.I.J., Ser. A, No. 10 (1927), at 16 ("there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself"); *Interpretation of Article 3(2) of the Treaty Lausanne*, P.C.I.J., Ser. B, No. 12 (1925), at 22 (where treaty language is clear, "the question does not arise whether consideration of the work done in preparation of the Treaty of Lausanne (*les travaux preparatoires*) would also lead to the conclusions set out above").

results.[45] Because those conditions are not present with respect to Article 33,[46] reliance on the *travaux* here is entirely unnecessary.

In addition, the general rule of treaty construction allowing resort to preparatory work "has no application to oral statements made by those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body." *Arizona* v. *California*, 292 U.S. 341, 360 (1934). Here, the government has not introduced evidence that the comment upon which it now seeks to rely was communicated to the United States' government or the Senate in connection with the ratification of the Convention.

In any event, it is clear that, when placed in its proper context, the Dutch delegate's comment is not an official interpretation of the Convention nor a binding limitation on the Convention's plain language. Rather, it may best be characterized as a parliamentary gesture by a delegate whose views did *not* prevail upon the negotiating conference as a whole. Earlier in the proceedings, the

[45] Article 32 of the Vienna Convention states:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

[46] Indeed, petitioners' interpretation leads to absurd results. As Nehemiah Robinson observes, a restrictive reading of the term "*refoulement*" leads to the incongruous conclusion that "if a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is his hard luck. *It cannot be said that this is a satisfactory solution.*" Robinson, *supra*, at 163 (emphasis added). Again, this commentator's failure to reconcile this incongruity with his interpretation of the treaty undermines the government's reliance on his conclusions.

Ad Hoc Committee delegates from France, Belgium, and the United Kingdom made clear that the principle of *non-refoulement*, which existed only in France and Belgium, proscribed the rejection of refugees at a country's frontier. See *supra* at p. 9. Consistent with the United States' historically strong support of non-return, the United States delegate to the Committee, Mr. Louis Henkin, confirmed that:

> . . . Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same.
>
> *Whatever the case might be . . . he must not be turned back to a country where his life or freedom could be threatened.* No consideration of public order should be allowed to overrule that guarantee, for if the State concerned wished to get rid of the refugee at all costs, it could send him to another country or place him in an internment camp.

Ad Hoc Committee on Statelessness and Related Problems, *Summary Record of the Twentieth Meeting* 11-12, ¶ 54-55, U.N. Doc. E/AC.32/SR.20 (1950) (emphasis added). Speaking next, the Israeli delegate to the Ad Hoc Committee reiterated that Article 33 "must, in fact, apply to all refugees, whether or not they were admitted to residence," *id.* at 12-13, ¶ 60, and concluded that "[t]he Committee had already settled the humanitarian question of sending any refugee . . . back to a territory where his life or liberty might be in danger." *Id.* at 13, ¶ 61.

The issue having thus previously been settled, the Dutch delegate sought, unsuccessfully, to limit the language of the treaty. Relying on the opinion of the delegate from Switzerland, where the term "*refoulement*" did not exist, Baron van Boetzelaer of the Netherlands

recalled that at the first reading the Swiss representative had expressed the opinion that the word "expulsion" related to a refugee already admitted into a country, whereas the word "return" ("*refoulement*") related to a refugee already within the territory but not yet resident there.

. . . .

At the first reading the representatives of Belgium, the Federal Republic of Germany, Italy, the Netherlands and Sweden had supported the Swiss interpretation.

. . . .

In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33.

> There being no objection, the PRESIDENT ruled that the interpretation given by the Netherlands representative should be *placed on the record.*

Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Thirty-Fifth Meeting* 21, U.N. Doc. A/Conf.2/SR.35 (1951) (emphasis added).

Significantly, formal amendments to the Convention to which delegates consented were "agreed to" or "adopted." [47] The Dutch delegate's comment, by contrast, was merely placed on the record, a tacit acknowledgement that the views he expressed did not enjoy sufficient support to alter the actual language of the treaty. Accordingly, it cannot be assumed that other delegates agreed

[47] Thus, for example, a Swedish suggestion that the words "membership of a particular social group" be inserted into Article 33 after the word "nationality" was "adopted unanimously." *Id.* at 22. Two other changes to the actual wording of Article 33 were followed by the comment: "It was so agreed." *Id.*

with the comment simply because they did not object to their colleague's request to memorialize it.[48] The process of placing comments on the record did not reflect agreement with such comments, only that they were recorded and preserved.

The agreement to place this comment on the record thus provides no support for petitioners' contention that Article 33 applies only to refugees within a State, and certainly does not demonstrate that the treaty drafters intended to permit a State to act many miles from its territory to intercept and return refugees to the country from which they fled. Indeed, petitioners have cited no evidence whatsoever that the drafters ever contemplated, let alone approved of, a course of conduct so at odds with the humanitarian goals of Article 33. Unlike the Netherlands, the United States could close its borders without forcing the return of refugees to Haiti. Instead, it has gone a step further and effectively prevented the Haitian refugees from fleeing either to the United States or to any other country in the same general direction. Nothing in the treaty's negotiating history remotely suggests that the drafters intended to permit such action.[49]

[48] While the Dutch delegate purported to state what he "gathered" was a "general consensus of opinion," his statement reflects at most the views of only six of the 26 states that participated in the drafting of the 1951 Convention. Article 33 was eventually adopted by a 20 to 0 vote, with three abstentions. *Summary Record of the Thirty-Fifth Meeting, supra,* at 25.

[49] Indeed, the Dutch delegate himself expressly qualified his stated concerns. Earlier in the negotiations he had made clear that his country was concerned about mass migrations *"unless international collaboration was sufficiently organized to deal with such a situation."* Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Sixteenth Meeting* 11, U.N. Doc. A/Conf.2/SR.16 (1951) (emphasis added). During the past 40 years, such collaboration has been organized under the auspices of the Office of the United Nations High Commissioner for Refugees.

In short, the *travaux preparatoires* hardly represent "extraordinarily strong contrary evidence" [50] which repudiates the plain meaning of Article 33. Therefore, the plain meaning should control.

CONCLUSION

For the foregoing reasons, UNHCR, as *amicus curiae*, respectfully urges that the decision of the Second Circuit be affirmed.

Respectfully submitted,

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[50] *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982).

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BRIEF OF *AMICI CURIAE* HAITIAN SERVICE ORGANIZATIONS, IMMIGRATION GROUPS AND REFUGEE ADVOCATES

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INTEREST OF AMICI

The American Baptist Churches in the U.S.A. is a national religious denomination of some 6,000 congregations with some 1.5 million members, with national offices in Valley Forge, Pennsylvania. The General Board of the American Baptist Churches in the U.S.A. has adopted a Resolution on Haitian refugees condemning the glaring inequity of the United States

policies as applied to Haitian refugees and appealed to the United States and Attorney General to immediately grant permanent sanctuary to Haitians who have fled to the United States for safety and civil liberty. The Board has urged President Bush to stop the discriminatory exclusion of Haitian boat people and recognize that many are refugees whose lives may be at risk if they are compelled to return to Haiti.

The American Council for Nationalities Service (ACNS) is a national, nonprofit, non-sectarian organization with a 75-year history of service to refugees, immigrants and others in migration. Forty community-based affiliates located throughout the U.S. provide refugee resettlement, immigration counseling, and other supportive services meant to ease the burden of transition both for newcomers and the communities that receive them. Haitian refugees is one of the many groups with which ACNS has worked over the years. ACNS is a member of the National Coalition for Haitian Refugees.

ACNS disagrees strongly with the Executive Order of May 24 returning refugees to Haiti and supports the Brief of Amici Curiae to be filed in the case of *Haitian Centers Council, Inc. v. McNary*.

Casa de Proyecto Libertad is a non-profit organization providing pro bono legal services, primarily to refugees in INS detention.

Catholic Community Services is pleased to sign on as a party interested in seeing an end to the policy promulgated in President Bush's Executive Order to summarily return Haitian refugees to Haiti without first determining if they might be political refugees. Catholic Community Services was founded in 1931. Since 1957, it has provided social services to refugees and people seeking political asylum in South Florida. When the first Haitian boat people arrived in 1972, they were assisted with

housing and jobs. Since that time, the agency has not ceased to offer assistance and to act as an advocate on their behalf. More recently, the agency has settled over half of those brought from Guantanamo during the current year.

The Center for Immigrants Rights, Inc. is a not-for-profit legal educational organization that serves immigrant groups in the metropolitan New York area. We support the efforts to rescind the unfounded and anti-humanitarian policy of forced repatriation of Haitian refugee-seekers from the high seas.

The Child Welfare League of America (CWLA) is a 70-year-old organization comprised of 690 child welfare agencies from across the United States. With the more than 200,000 staff members from its member agencies, CWLA works to ensure quality services for over two million abused, neglected, abandoned, homeless and troubled children, youth and families. Because of its concerns about all vulnerable children and families, CWLA has long supported the work of agencies serving refugee children and families and has advocated for policies that support refugees in need of protection. CWLA joins as amicus in this case because given the current conditions in Haiti, the policy of returning refugees to Haiti without a determination of their claims of persecution has and will continue to have a devastating impact on children and their families. The current policy subjects children and their families to serious risks of torture, loss of life, and loss of freedom and violates the principles underlying child welfare policy and practice.

Florida Rural Legal Services, Inc. is a non-profit agency whose mission is to provide a number of effective and high quality legal services to economically disadvantaged individuals and groups in order that they may have legal access to justice. A grant from the Florida Bar foundation has enabled FRLS to open an office in Miami to coordinate the Haitian Guantanamo

cases in Florida. Under terms of the grant, the Miami office of FRLS will coordinate the legal efforts among the various immigration assistance agencies working with the Haitians. This work includes providing legal assistance for the HIV positive Haitians brought from Guantanamo to Miami.

Global Exchange is a non-profit education and action organization dedicated to furthering the understanding between peoples of the first and third worlds. Since 1988, we have had a staff person and consultant in Haiti working with grassroots groups. Our staff person has worked as a journalist for the Christian Science Monitor, the San Francisco Chronicle and National Public Radio. Global Exchange has sponsored speaking tours of Haitian activists. We have also sent a number of fact-finding delegations to Haiti after the September 1991 coup. With this background and understanding of the current Haitian situation we are quite concerned about the plight of the Haitian refugees. There is absolutely no way that their safety can be assured in Haiti. We strongly oppose the Summary Return of the Haitian Refugees.

The Haitian Refugee Center (HRC) is a community based non-profit organization that provides free legal services to indigent Haitian refugees seeking asylum in the United States. In December of 1991 HRC sued the United States Government, *HRC v. Baker*, 953 F.2d 1498 (1992), in an effort to protect the rights of Haitian Refugees fleeing political persecution in Haiti. HRC strongly condemns the new U.S. policy to return all Haitian Refugees to Haiti. HRC supports the Haitian Centers Council in its efforts to secure Justice for the Haitian people.

The International Ladies Garment Workers Union—a union founded in 1900—represents apparel workers all across the United States. The union is concerned about immigration and refugee policy as it effects a significant part of the union

membership. The union subscribes to the Amicus Curiae submitted on behalf of *Haitian Centers Council v. McNary.*

The International Rescue Committee has consistently opposed the forcible repatriation of refugees throughout the world. In addition, it supports the requirement that fair screening policies be implemented to determine refugee status. The Executive Order issued on May 24, 1992 is contrary to international and U.S. law and jeopardizes the life and liberty of those Haitians who fear persecution upon their return.

The International Institute of Boston (IIB) endorses both the spirit and the letter of this *amicus* brief. The IIB is a social service agency which has been assisting refugees and immigrants since its incorporation in 1924. Through its Asylum Representation Project in the Immigration Legal Service Department, the Institute has handled hundreds of asylum cases and requests for assistance. In recent months, we have taken on a considerable number of Guantanamo Haitians escaping after the coup which upset the Aristide government. It is on their behalf, and on behalf of our other asylum clients, present and future, that we sign on to this *amicus* brief.

The International Rescue Committee, which has served refugees here and abroad since 1933, stands ready to provide assistance to Haitian refugees.

The Lawyers' Committee for Civil Rights Under Law of Texas/Immigrant & Refugee Rights Project ("Texas Lawyers' Committee") is a non-profit organization that represents immigrants and refugees in class-action suits and "impact" litigation before the U.S. federal and immigration court systems. The Texas Lawyers' Committee is dedicated to the preservation and advocacy of the rights of those fleeing persecution in their home countries and seeking asylum in the United States under

U.S. immigration law, international law, and treaties to which the United States and Haiti are signatories.

The Lutheran Immigration and Refugee Service (LIRS), a cooperative agency of the Evangelical Lutheran Church in America, the Lutheran Church-Missouri Synod and the Latvian Evangelical Lutheran Church in America, provides a variety of immigration, asylum and refugee-related services. Through its Children's Services, Immigration Services, and First Asylum programs, LIRS has provided assistance to Haitians fleeing persecution in their country. LIRS has actively advocated for the fair treatment of Haitians seeking asylum in the United States.

The Midwest Immigrant Rights Center, a program of Travelers & Immigrants Aid, is a *pro bono publico* political asylum defense project that provides legal representation to low-income immigrants seeking asylum in the United States. The Center's staff has prepared asylum applications for Haitian parolees both in Miami and Chicago, and currently has several Haitian parolee clients. Center staff and volunteers have interviewed dozens of Haitian parolees, and have found that the majority have strong asylum cases, and virtually all have genuine, legitimate fear of persecution in Haiti.

The National Conference of Black Lawyers (NCBL) is an activist legal organization whose membership includes lawyers, judges, law professors, law students, and legal workers. The organization consists of a network of twenty-two state and local chapters, with affiliates in Canada, England, and the Caribbean. Founded in 1968 as an outgrowth of the movement for Black empowerment, NCBL has and continues to work to eliminate racial oppression and racism in the U.S. legal, correctional, and policing systems and advocates the full realization of human rights of Black people both in the United States and abroad. NCBL has long focussed on international issues of human rights,

peace, and development and has participated in and sponsored international conferences, organized fact-finding missions abroad, and maintains Non-Governmental Organization (NGO) status at the United Nations. NCBL recognizes that the executive order recently issued that authorizes the return of Haitian refugees fleeing political persecution is not only an issue of international law and concern but is a matter deeply affecting communities here as well. Erosion of rights for legitimate political refugees impacts the rights of all.

The National Emergency Civil Liberties Committee (NECLC) is a national organization which for over 40 years has been concerned with civil rights, including, for nearly twenty years, the rights of Haitian refugees. NECLC attorneys have served and continue to serve as counsel for Haitian refugees in numerous administrative proceedings and court suits. The NECLC believes that the nonadherence by U.S. government authorities, with regard to the treatment of Haitian refugees, to the mandate of the immigration statute tends not only to unsettle the rights of all refugees but also to undermine equal justice and the rule of law in a democratic society. The prejudgment of the rights of the Haitian boat people is in the last analysis an adverse judgment on the rights of the American people.

National Immigration Project of the National Lawyers Guild/Haiti Asylum Committee recruits and trains law students, legal workers and attorneys to work with Haitian asylum seekers in the United States. For over fifty years the National Lawyers Guild has provided legal assistance to movements for justice and social change in the United States and has supported the aspirations for self determination of those living in other countries. The Haiti Asylum Committee was created to respond to the crisis in legal representation for Haitians fleeing the military regime which overthrew the first democratically elected President of Haiti, Jean Bertrand Aristide. The Guild will

continue this work until President Aristide is restored to power and the U.S. government complies with international and domestic law by respecting the rights of Haitians fleeing persecution in their homeland.

Northwest Immigrant Rights Project (NWIRP) has been providing immigration legal services and advocacy to low-income immigrants and refugees in the Northwest for more than a decade. NWIRP is the only project of its kind in the region, serving more than 6,000 people each year. NWIRP is currently spearheading a project to provide legal representation to a group of Haitian refugees. The refugees are all unaccompanied minors who were screened-in at Guantanamo Bay and are now residing in Western Washington. Our experience demonstrates that these young people have strong political asylum claims and possess a genuine fear that they would suffer persecution if returned to Haiti.

People For the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has over 300,000 members nationwide. The organization's primary mission is to educate the public on the vital importance of the democratic tradition of liberty and freedom, and to defend it against those who would seek to limit fundamental rights and freedoms. Part of this country's democratic tradition is our long and proud history of providing safe haven to individuals facing political persecution. People For strongly believes that it violates that tradition, as well as international and domestic law, for our great country of immigrants to return individuals who may face political persecution to hostile shores without even a hearing on their plight. People For has participated in administrative and

legislative efforts on this issue, and accordingly joins in this *amicus* brief.

The Refugee Assistance Council is a non-profit organization that provides *pro bono* legal services to indigent aliens who are living or detained in the Laredo, Texas area and who seek asylum in the United States. The Refugee Assistance Council is dedicated to the preservation and advocacy of the rights of those fleeing persecution in their home countries and seeking asylum in the United States under U.S. immigration law, international law, and treaties to which the United States and Haiti are signatories.

Refugees, Immigration and International Ministries Commission of Ecumenical Ministries of Oregon, as a Haitian Service Organization, oversees all matters of international policy and concern, including EMO's refugee ministry, Sponsors Organized to Assist Refugees (SOAR) which has 57 Haitian clients currently.

Throughout the world and through a wide network of international contacts, Refugees International ("RI") monitors and analyzes refugee crises to develop and promote strategies and solutions that address specific refugee needs. Using both quiet diplomacy and the power of public opinion, RI presses governments and international organizations to improve protections for refugees. To maintain independence and objectivity, critical to its work both at home and overseas, RI is funded entirely through individuals, private foundations, and private corporations. In light of the refugee crises that have unfolded in the past year alone, the survival of thousands of refugees depends on RI's ability to speak out on their behalf.

Travelers & Immigrants Aid is a one hundred-year-old social service agency in Chicago which has provided legal and other assistance to immigrants and refugees. The agency has provided services to many Haitian refugees in the past, and is now

providing legal and mental health services to Haitian parolees in the Chicago area. In addition, Travelers & Immigrants Aid staff traveled to Miami during February through April of 1992, assisting the U.S. Catholic Conference in interviewing scores of Haitian parolees and preparing their asylum applications. Travelers & Immigrants Aid believes that all people fleeing persecution in their home countries, including Haitians, should not be repatriated without the opportunity to seek asylum.

On profound historical, moral, and legal grounds, the Union of Councils for Soviet Jews is grateful for the opportunity to support the appeal of the Haitian Centers Counsel, *et al.* in the United States Supreme Court. For more than 20 years, we have been an advocacy organization dedicated to advancing the course of human rights, rule of law, and democracy in the former Soviet Union, with special emphasis on the internationally guaranteed right to leave one's country and return to it without governmental hindrance. Our movement grew out of the conviction that neither Jews, nor any others should ever again face the genocidal calamity of the Holocaust. We will never forget that the first "boat people" were Jewish refugees from Hitler, sailing the same waters as Haitians today, on the St. Louis, only to be turned away from the sanctuary of America's shores. America is today erecting a U.S. Holocaust Memorial Museum on the National Mall, to teach the lessons of the Holocaust and the lessons of democracy—one of which, in the words of Clemenceau, is that to infringe on the rights of one is to infringe on the rights of all. If the land of the free denies due process of law to legitimate claims for asylum and refugee status, we will have lost our moral and legal compass, and forfeited our ability to influence countries even less inclined than we are to offer safe harbors to those fleeing persecution. As a human rights organization, we cannot adopt the position of the passive onlooker. We are bound to join in the Brief of Amici Curiae.

The U.S. Committee for Refugees is a nonprofit, nongovernmental organization that defends the basic human rights of refugees, most fundamentally the principle of *non-refoulement.* USCR also defends the rights of asylum seekers to fair and impartial determination of their status and promotes decent and humane treatment for displaced persons. USCR pursues this mandate on behalf of refugees, asylum seekers, and displaced persons worldwide, regardless of ideology, nationality, race, religion, or social group.

SUMMARY OF ARGUMENT

The Executive's new policy directing the Coast Guard to return refugees to Haiti without even an interview to determine if any have a real fear of persecution contravenes principles of international and domestic law and sets a dangerous precedent for refugees worldwide who are in need of protection.

The violent overthrow of Haiti's first democratically elected president, Jean-Bertrand Aristide, has led to unprecedented numbers of refugees fleeing Haiti. Given the terror which pervades Haiti, many Haitians intercepted in the coming days demonstrably will have credible claims to asylum. Since the current crisis began, Immigration and Naturalization Service ("INS") asylum officers have found more than one-third of the fleeing Haitians to have a "credible fear" of persecution if returned to Haiti. If these determinations were conducted with procedural safeguards, such as allowing Haitians to see lawyers and/or representatives of refugee agencies and human rights groups, this proportion would likely be appreciably higher. By simply turning back boats without an adequate opportunity to hear Haitians' claims of persecution, the Coast Guard will undoubtedly return significant numbers of people who would be in grave danger and who merit asylum.

The announced opportunity for Haitians who fear persecution to "avail themselves of our refugee processing service at our Embassy in Port-au-Prince" offers no real protection since the Embassy is inaccessible to many in the countryside, and to many who fear encountering the Haitian military en route. It also has been extraordinarily restrictive in its decisions on refugee claims. The new policy violates international law and makes a mockery of the United States' support for "first asylum" for refugees elsewhere in the world. This is particularly true in the case of the basically similar group of boat people in Southeast Asia. Defendants' actions create a frightening precedent eroding refugee protections around the world. Countries averse to providing temporary shelter will now be able to cite the *refoulement* of refugees to Haiti as a precedent.

ARGUMENT

Defendants' new policy violates their binding duty not to forcibly return refugees to their persecutors. That duty is imposed both by statute, Immigration and Nationality Act § 243(h), 8 U.S.C. § 1253(h) (1990) ("INA"), and binding international agreements, United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, Art. I, 1968, 19 U.S.T. 6223, 6276, T.I.A.S. No. 6577 ("Protocol"); 1981 U.S.-Haiti Agreement, Agreement Effected by Exchange of Notes, Sept. 23, 1981 ("1981 U.S.-Haiti Agreement").

The obligations of the United States under Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, Art. 33, 1989, U.N.T.S. 150 ("Convention"), as applied under Article I of the Protocol, have, at least since the entry into force of the Protocol with respect to the United States on November 1, 1968, applied to actions of the United States with respect to individuals within and outside the United States. Under the obligations imposed by Article 33 of the Convention:

> No contracting state shall expel or return ("refouler") a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

(Emphasis added.)

Defendants' policy of encircling Haiti and forcing all those fleeing back to face persecution or even death clearly violates that binding legal obligation.

In the Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107 (1980) ("Refugee Act"), Congress re-affirmed that binding obligation by amending the Immigration and Nationality Act § 243(h), 8 U.S.C. § 1253(h) (1990) to conform to the language of the Protocol. As the Supreme Court has stated, "one of Congress' primary purposes was to bring United States refugee law into conformance with the [Protocol]." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). Under the Refugee Act, Congress' express intent was to create a *mandatory duty not to return* any alien to a country where such alien's life or freedom would be threatened. Congress mandated that:

> The Attorney General *shall not* deport or *return* any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion.

Immigration and Nationality Act § 243(h), 8 U.S.C. § 1253(h) (emphasis added). Again, by the express terms of the INA, defendants' policy of encircling Haiti and forcibly returning refugees to their persecutors is unlawful and cannot stand.

Under the express terms of the 1981 U.S.-Haiti Agreement, the United States agreed that, "[h]aving regard to . . . the international obligations mandated in the Protocol Relating to the Status of Refugees * * * under these arrangements the United States Government does not intend to return to Haiti *any* Haitian migrants whom the United States authorities determine to qualify for refugee status." U.S.-Haiti Agreement, at 1-2 (emphasis added). Defendants may not invoke the Agreement for authority to interdict Haitian vessels and at the same time ignore its very terms.

In sum, as defendants' own Legal Counsel advised in setting up the interdiction program under the 1981 Executive Order, in order to comply with the binding obligations of the United States, Haitians interdicted on the high seas, "must be given an opportunity to substantiate their claims." 5 Op. Off. Legal Counsel 242, 248 (1981). Section 243(h) of the INA, Article 33 of the Convention, and the U.S.-Haiti Agreement all bar the Executive from returning refugees to their persecutors. Defendants' actions far exceed their statutory and constitutional authority, are thus *ultra vires* and must be struck down. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GENE McNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* AMNESTY INTERNATIONAL AND AMNESTY INTERNATIONAL — USA IN SUPPORT OF RESPONDENTS

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No. 92-344

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

GENE MCNARY, COMMISSIONER,
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SERVICE, ET. AL.,
Petitioners

vs.

HAITIAN CENTERS COUNCIL, INC., ET. AL.,
Respondents.

BRIEF FOR *AMICI CURIAE* AMNESTY
INTERNATIONAL and AMNESTY INTERNATIONAL
-- USA IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS*

This brief is submitted *amicus curiae* by Amnesty International ("AI") and Amnesty International-USA ("AIUSA"), with the consent of the parties.

AIUSA is one of the 44 national sections of AI, an independent worldwide movement which works impartially to seek the release of "prisoners of conscience," defined as men and women detained anywhere because of their beliefs, color, sex, ethnic origin, language, or religious creed, provided they have not used or advocated the use of violence. AI also works for fair and prompt trials for all political prisoners, and opposes torture or other cruel, inhuman or degrading treatment or punishment.

AI was founded in London in 1961 and now has more than 1,000,000 individual members, subscribers, and supporters

in 150 countries. There are more than 4,200 AI groups in more than 70 countries, working in support of all aspects of AI's mandate. Since AI was founded, AI groups have intervened on behalf of over 25,000 prisoners in more than 100 countries.

Basing its mandate on the Universal Declaration of Human Rights, GA Res. 217A, U.N. Doc. A/810 (1948), and other international standards for the protection of human rights, AI operates independently of any government, political grouping, ideology, economic interest or religious creed and does not therefore support or oppose the views of any person whose rights it seeks to protect. Nor does AI grade governments according to their record on human rights. Rather than attempting such comparisons, AI concentrates on trying to end specific human rights abuses within its mandate and advocates that all governments comply with international standards to protect human rights. For its work, AI received the Nobel Peace Prize in 1977.

On the basis of missions, interviews and a worldwide network of correspondents, AI's International Secretariat in London collects information and issues reports on human rights conditions throughout the world. AI has also issued reports with respect to refugee protection -- including procedures for the determination of refugee status -- in a number of countries, including the United States. This information is disseminated to governments and the public in reports, interventions, and various other materials.[1]

AI's concern for refugees and asylum-seekers arises from its work for the protection of human rights, which includes opposition to the forcible return of any person to a country where he or she may reasonably be expected to be imprisoned as a prisoner of conscience, or to be subjected to

[1] AI has formal consultative status or similar formal relations with the United Nations ("U.N."), UNESCO, the Organization of American States, the Council of Europe, and the Organization of African Unity.

torture, "disappearance", or execution. AI therefore seeks to ensure that governments observe the principle of *non-refoulement* -- expressed in the U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 ("Convention"), as incorporated by the U.N. Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268 ("Protocol")[2] -- and that all refugees have access to a fair and adequate refugee determination procedure. Accordingly, AI participated in the legislative process which led to the passage of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, et seq. (1980) (the "Refugee Act" which amended §243(h) of the Immigration and Naturalization Act of 1952 or "I.N.A.", 8 U.S.C. § 1253(h)(1)), and regularly provides information about country conditions and international legal standards to courts, administrative agencies, and decision-makers at all levels of the refugee process, including through the submission of *amicus curiae* briefs to the courts of the United States. *See, e.g., INS v. Stevic*, 467 U.S. 407 (1984); *Jean v. Nelson*, 472 U.S. 846 (1985).[3]

[2] Although the United States is not a signatory to the Convention, since 1968 it has been a party to the Protocol, which incorporates Articles 2 through 34 of the Convention. The United States thereby agreed to be bound by those Articles of the Convention, including Article 33. Accordingly, for the purposes of this brief, references to the Protocol and U.S. obligations under it will include the Convention and its provisions. Unless otherwise specified, references to "Articles" will be to Articles in the Convention, as incorporated by the Protocol.

[3] Although AI is often unable to express an opinion about the validity of a particular applicant's fear of persecution, the Immigration and Naturalization Service ("INS") and the courts have relied upon AI's expertise in assessing the human rights situation in various nations around the world for the purpose of evaluating an individual's request for asylum in this country. See, e.g., *Fernandez-Roque v. Smith*, 539 F. Supp. 925 (N.D. Ga. 1982);

AI is specifically interested in this case because the Executive Order deprives Haitian asylum seekers who are interdicted at sea of any possibility of exercising their right to seek asylum and to protection against *non-refoulement*. As such, it is an egregious violation of international law that both places Haitians at risk of human rights violations upon return, and directly undermines the international regime for the protection of refugees. AI strongly holds the position that under international standards refugees are entitled to a hearing on the merits of their *non-refoulement* claims by the established authority through a fair and adequate procedure. It is AI's view that a dangerous precedent would be set if the executive branch of government were allowed to deny refugees a hearing on the merits of their *non-refoulement* claims.

Coriolan v. INS, 559 F.2d 993 (5th Cir. 1977). The United States Congress has also recognized the integrity of AI's human rights information. See, e.g., International Financial Institutions Act of 1977, 22 U.S.C. § 262g.

SUMMARY OF ARGUMENT

AI and AIUSA respectfully urge this Court to affirm the Second Circuit's decision[4] to grant injunctive relief. As the District Court acknowledged in its original order denying the requested injunction a denial of relief leaves the United States free to "return Haitian refugees to the jaws of political persecution, terror, death and uncertainty when it has contracted not to do so."[5] While the District Court correctly concluded that at least some of the repatriated Haitian refugees face serious human rights violations, it erred in holding that the rule barring the return of refugees to territories where they would face such violations may not be invoked before the courts of the United States.[6] The Court of Appeals correctly held that the applicable law in this country prohibits the government "from returning to Haiti any interdicted Haitian whose life or freedom would be threatened on account of his or her race, religion, nationality, membership in a particular social group, or political opinion."[7]

The principle of non-return or *non-refoulement* is a fundamental pillar of the international legal regime governing the status of refugees. As a rule enshrined in treaties and general customary international law, it is part of the law of the

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[4] The opinion of the Court of Appeals is reported as *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1350 (2d Cir. 1992).

[5] Memorandum and order of June 5, 1992 at p. 7.

[6] That rule is set out in Article 33 of the U.N. Convention Relating to the Status of Refugees, and is incorporated by reference into Article 2 of the U.N. Protocol Relating to the Status of Refugees. The United States is a party to this Protocol.

[7] *McNary*, 969 F.2d at 1367-1368.

United States. Furthermore, the U.S. Congress has directly incorporated this principle into § 243(h)(1) of the I.N.A., 8 U.S.C. § 1253(h)(1). Thus U.S. law clearly requires that any person who claims to be seeking refuge from persecution be afforded a hearing on those claims before being subjected to involuntary repatriation.

Contrary to arguments which have been advanced by the Petitioner,[8] the fact that there is a massive Haitian refugee crisis is no justification for denying individuals the required hearings. Refugee flows generally result from "crisis" conditions. The very purpose of the U.N. Convention and the U.N. Protocol is to affirm binding international standards for dealing with refugee flows resulting from such crises.[9] Past practices of the U.S. Government and statements by U.S. Government officials support this conclusion. Furthermore, the U.S. policy of interdiction is over broad and contrary to the international legal obligations of this country because it interferes with the right of individual Haitians to seek asylum abroad, a right which is recognized by customary international law.

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[8] See, Defendant's Memorandum in Opposition to the Entry of Injunctive Relief Respecting the New Executive Order, filed with the District Court below on May 29, 1992, at 1-6.

[9] The intergovernmental Executive Committee of the UNHCR, in which a United States government representative participates, has affirmed with regard to cases of large scale influx of refugees, "In all cases the fundamental principle of non-refoulement--including non-rejection at the frontier--must be scrupulously observed." Executive Committee Conclusion No. 22(XXXII), Protection of Asylum Seekers in Situations of Large-Scale Influx, 32nd Session (1981), § II(2).

ARGUMENT

A. CONDITIONS IN HAITI TODAY ARE SUCH THAT REPATRIATED HAITIAN REFUGEES FACE A VERY REAL THREAT TO THEIR LIVES AND FREEDOM AND HAVE LITTLE EFFECTIVE OPPORTUNITY TO APPLY FOR ASYLUM IN THE UNITED STATES THROUGH DIPLOMATIC/CONSULAR CHANNELS

1. Human Rights Conditions in Haiti

Amnesty International's January 1992 report, *Haiti: The Human Rights Tragedy - Human Rights Violations Since the Coup* (AI Index AMR 36/03/92)[10] documented widespread human rights violations in Haiti. The Haitian *de facto* authorities have violated the rights of individuals and groups from broad sectors of the population which the authorities perceive have opposed their rule since the coup d'etat on September 30, 1991. These abuses included large numbers of arbitrary arrests, ill-treatment and torture, resulting in severe injuries and death in some cases, as well as disappearances, extra-judicial executions and killings by the security forces and armed civilians working with them.

In a research mission to Haiti from March 20 through April 3, 1992, and in the course of ongoing research contacts with Haiti since then, Amnesty International has continued to receive extensive detailed reports which indicate that the human rights crisis in Haiti remains extremely serious as the security forces and their collaborators arrest, intimidate, ill-treat and torture perceived opponents. The Findings of AI's mission to Haiti are set out in "Human Rights Held to Ransom" published in August 1992 (AI Index AMR 36/41/92),

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[10] This report is in the record as Plaintiff's Exhibit #30.

which also contains an update of the human rights situation through July 1992.

The crisis has worsened in several respects:

1) The condition of people in hiding has deteriorated:

a) The weeks and months during which many thousands of people who were forced into hiding, fearing for their lives, have taken a great toll on the victims. Many of them have been forced to flee from one place of hiding to another.

b) Many have suffered ill-treatment or torture and have been unable to obtain necessary medical care for fear of discovery and persecution by the security forces. They also have great difficulty obtaining food and other supplies as they know that the authorities will arrest them if they are caught obtaining supplies. Anyone bringing them supplies or providing shelter runs considerable risk of arrest, ill-treatment, or torture as well.

c) When those in hiding are forced to return to their families, their homes, or their communities, due to exhaustion, medical necessity, intense hunger, or the net effect of long-term trauma, they are often threatened with death, beaten, arrested, insulted, humiliated, and forced into hiding again.

2) The situation of those not in hiding has worsened:

a) Living with the constant fear of what the security forces will do next and the fear of what will happen to a relative or colleague if taken into custody has left many people traumatized. So broad is the network of government informants and so prevalent the climate of terror throughout much of Haiti that many people known to have worked for social change through popular organizations and groups are extremely restricted in their activities.

b) The security forces and their collaborators have continued to increase their ability to terrorize sections of the population. This campaign is facilitated by deployment of large numbers of armed civilian informants throughout the country who report on the activities of anyone supporting the

democracy movement in Haiti and the government of Jean-Bertrand Aristide.

The authorities frequently resort to the practice of arbitrary, short term arrest with severe beatings and the deployment without warning of heavily-armed uniformed military personnel who shoot into the air during the night or enter a neighborhood without warning in large numbers, carry out searches, burn homes or confiscate property, and arrest and beat people who are present, warning them that they may be killed at a subsequent encounter. Even family members of people perceived to be opponents have been abducted, threatened, insulted, or otherwise terrorized and humiliated.

Reports of shootings by the security forces, heavily armed individuals, or groups in civilian clothes continue with alarming frequency. In some cases the bodies are left on the street; in others, the families have difficulty in obtaining access to the bodies.

c) Family members of those in hiding also suffer, since persons in hiding have no access to their traditional livelihood and thus cannot support their families. Fields have been left untended and children have gone hungry.

d) The authorities continue to suppress information or materials critical of the *de facto* government or in favor of the government of deposed President Jean Bertrand Aristide. Military personnel search travellers for posters, photographs, t-shirts, newspapers, or letters and have arrested or severely beaten people found to be in possession of these or similar articles. The military has also broken up meetings of high school students, worshippers, and even people simply found listening to a radio station such as Voice of America or a clandestine broadcast of news relating to Haiti's democracy movement.

Civilian informants attempt to monitor all activities in and around places where popular organizations meet or where people congregate in numbers. This has resulted in the arrest or ill-treatment of priests and of individuals attending religious meeting where the authorities considered the priest to be a political opponent. In many documented cases, the only way

to avoid arrest, ill-treatment or harassment has been through bribing local authorities.

These conditions explain why so many Haitians have fled their country seeking escape from persecution and suggest the need for careful investigation of claims for asylum in the context of this crisis.

2. The Impact of the Current Human Rights Crisis on Human Rights Monitoring and the Asylum Process

Because many Haitians working for social change have been displaced and cut off from their constituencies, while, on the other hand, numerous civilian informants have been deployed, many supporters of the elected government of President Aristide do not know whom they can trust. Accordingly, many people will disguise their political sympathies or withhold information about abuses they may have suffered.

Similarly, it is very dangerous for Haitian human rights monitors to gather information about human rights abuses. They are afraid that their efforts will be monitored by the authorities and may lead the authorities to discover where possible victims are hiding. Reprisals by the military and their collaborators do not necessarily take place in a consistent or predictable manner. For many, the threat of arrest is a constant in their daily lives.

Amnesty International has received many consistent reports of people being informed their name has appeared on a list of people who are to be arrested. Often the members of the security forces who are familiar with the lists are said to have been transferred to another part of the country. Accordingly, people who have fled to a different area report that they have difficulty finding anywhere to hide where there is not the risk that a member of the military or an informant will eventually discover them. In some cases the authorities

have taken advantage of the presence of human rights monitors or foreign visitors to the region to collect information, and accordingly many of those who have the most to fear from the authorities will be very reluctant to meet with foreign delegations or any people they do not fully know and trust. Similarly, human rights monitors are reluctant to meet with people in hiding for fear of leading the authorities to the people they are pursuing or giving the authorities further pretext for accusations that given individuals who have contact with foreigners are "troublemakers".

In some cases, documentation of human rights violations has become more difficult not only because of the danger to those who collect or communicate information, but also due to the broad sense of frustration and despair on the part of Haitians who have been victims of or witnesses to human rights violations. To them, the nature of the persecution in Haiti and the level of human rights violations are of such common knowledge that they cannot understand that someone may not be aware of these events. They are shocked when investigators, monitors and others question their accounts. They often do not understand why someone would need to document what is to them perfectly obvious.

Many of these individuals say they do not feel they can trust people with information which might cost them their lives. The fact that thousands of Haitians are being turned over by US government officials to Haitian police, and that thousands of Haitians are being intercepted by the US Coast Guard and returned to Haiti without any kind of interview, indicates to many Haitians that the Haitian military and the US government are working together and that supporting democracy in Haiti is seen as criminal activity. Many of them say they are convinced that they would be arrested if they attempted to reach an embassy or to make contact with an international organization, and their fears have been borne out by events. In one case, an Amnesty International contact was arrested in the Central Plateau and accused of securing the release of prisoners through contacting AI.

In recent weeks, Amnesty International has received numerous reports that those interdicted on the high seas and returned to Haiti by the US authorities have been arrested, apparently to identify the organizers of the boat trips, held for several hours and then released. Those accused of being the organizers are normally held for several days but, as far as Amnesty International is aware, they have never been subjected to legal proceedings or charged with a recognizable criminal offense under Haitian law.

AI fears that these short-term arrests may be carried out to intimidate those who are exercising their right to leave their country and seek asylum. As recently as November 30, 1992, 14 people were arrested upon arrival in Port-au-Prince after having been intercepted by US Coast Guard ships and forcibly returned to Haiti. According to the information available to AI, the group had apparently been unwilling to leave the Coast Guard ship, but they were subsequently handed over to the Haitian authorities by US Coast Guard officers and immediately arrested and accused of having organized the boat trips. They remained in detention for several days and, as far as AI is aware, were released uncharged.

3. The Opportunity For Asylum With United States Authorities in Haiti is Illusory For Most Haitians Threatened With Persecution and Does Not Affect the Protections Due Haitians Intercepted By U.S. Authorities Outside Haiti

The Government has argued that those repatriated can avail themselves of the opportunity to apply for asylum at the Embassy of the United States in Haiti. Due to surveillance, intimidation and other factors, this opportunity may only be illusory for those most in need of political asylum. For a Haitian asylum seeker who is a victim of political persecution in his own country, and who is in hiding from the military or

the police, any attempt to apply for refugee status with U.S. authorities in Haiti would expose him to a substantially increased risk of political persecution.

In any case, even the ready and effective availability of an alternative channel for seeking asylum could not excuse the violation of the principle of *non-refoulement*, which prohibits the return of a refugee "*in any manner whatsoever* to ... territories *where his life or freedom would be threatened*" for political reasons.[11] To assert otherwise is to challenge a fundamental aspect of the internationally recognized right to asylum.

B. THE INTERNATIONAL LEGAL NORM OF NON-REFOULMENT IS APPLICABLE TO THIS CASE

1. The UN Protocol Relating to the Status of Refugees, a Treaty Which Prohibits the Return of Refugees to Territories Where They Face Persecution, is Directly Applicable to This Case

As a party to the United Nations Protocol Relating to the Status of Refugees,[12] the United States is bound by the obligation of *non-refoulement* set out in Article 33(1) of the

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[11] Article 33(1) of the Convention (emphasis added).

[12] U.N. Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

United Nations Convention Relating to the Status of Refugees[13] which states, in pertinent part, that:

(1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion.

The Protocol is a "Treat[y] made ... under the Authority of the United States," the provisions of which are the "supreme law of the land." U.S. Const., Art. VI § 2. Like all treaties, the Protocol therefore qualifies in some measure the sovereignty of the United States. *See The F.S. Wimbledon* 1923 P.C.I.J., (ser. A), No. 1, 24, 25. The United States treaty obligations under the Convention require the government to comply with the *non-refoulement* requirement of Article 33(1). *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987). The *non-refoulement* requirement of Article 33(1) must be given effect by the courts because it is self-executing. *Cardoza-Fonseca*, 480 U.S. at 429 ("Article 33(1) imposes a *mandatory duty on contracting States*") (emphasis added); *see also Coriolan*, 559 F.2d at 996-997; *Nicosia v. Wall*, 442 F.2d 1005, 1006 n. 4 (5th Cir. 1971).

The Government has argued, based on its interpretation of the negotiating history of the Refugee Convention, that Article 33 does not impose any obligations in cases of mass migrations across frontiers or of attempted mass migrations.[14] As the Court of Appeals noted in the opinion below,[15] the Treaty's negotiating history is quite

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[13] U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

[14] Brief for the Petitioners, pp. 42-43.

[15] *McNary*, 969 F.2d 1350, 1365-1366.

ambiguous. In contrast, the language of Article 33(1) is clear and unambiguous in proscribing the "return ... of a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion."

The force of such language is further reinforced by reference to the Vienna Convention on the Law of Treaties, which sets out rules for the interpretation of treaties are widely considered to codify international law.[16] The basic rule in the Vienna Convention is that treaties must be interpreted in accordance with the ordinary meaning of their terms.[17] Recourse may be had to the negotiating history of a treaty to determine a different meaning only when the ordinary meaning of the terms is ambiguous or obscure, or when that ordinary meaning leads to a manifestly absurd or

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[16] See Vienna Convention on the Law of Treaties, concluded May 23, 1969, entered into force Jan. 27, 1980, 1155 U.N.T.S. 331, U.N. Doc. A/Conf. 39/27, reprinted in 8 I.L.M. 679 (1969). The United States has signed but not ratified the Vienna Convention, but even in this country it is "generally recognized as the authoritative guide to current treaty law and practices." See Letter of Submittal by the Secretary of State to the President, in S. Exec. Doc. L, 92d Cong., 1st Sess. at 1 (1971), also quoted in American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States, pt. III, intro. note.

[17] See Vienna Convention on the Law of Treaties, art. 31 ("General rule of interpretation"). Article 31(1) states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

unreasonable result.[18] Neither of these conditions pertains here, and thus there can be no justification for deviating from the clear meaning of the treaty language.

Even if Article 33(1) were to be rewritten according to the government's view of the negotiating history, this would simply permit the closing of the border to refugees. The affirmative action of returning refugees to a place where they face persecution would still contradict the dictates of Article 33(1).

2. Section 243(h) of the Immigration and Naturalization Act Incorporates the International Standard of Non-Refoulement Directly Into US Federal Law

International law has long been accepted as an important source for the interpretation of statutory and constitutional provisions, *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (international legal principles inform congress' power of exclusion and deportation of aliens), and it has, from the earliest cases, been recognized and applied by United

[18] Id. Article 32, which provides that:
"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to Article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable."

States courts. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796).[19]

Thus, the courts have affirmed that federal statutes "ought never to be construed to violate the law of nations, if any other possible construction remains ..." *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982), quoting *Murray v. The Schooner Charming Betsey*, 6 U.S. (2 Cranch) 64 (1804). This axiom is particularly compelling with regard to the Refugee Act in light of Congress' intent to conform United States immigration law to the requirements of the Protocol.

In *Cardoza-Fonseca*, this Court found support in the history and the plain language of the Refugee Act, for the principle that international law for the protection of refugees both inspired the Act and continues to play an important role in its interpretation. 480 U.S. at 437 ("If one thing is clear from the legislative history of the new definition of "refugee," and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees ...").[20] In particular, the I.N.A.

[19] See also Restatement (Second), §§ 102, 135; Comment j (customary international law has the same force and effect as treaties and international agreements, and thus like federal statutes is the "law of the land."); *Palma v. Verdeyen*, 676 F.2d 100, 103 (4th Cir. 1982) ("in an appropriate case, to ascertain what Congress has authorized, one must consider the treaties, agreements, and customary international law to which the United States subscribes, as well as to domestic law."); accord *Bowater S.S. v. Patterson*, 303 F.2d 369 (2d Cir.), cert. denied, 371 U.S. 860 (1962).

[20] See also, *Stevic*, 467 U.S. at 426-427 (Act adopted and expanded Protocol's definition of refugee and was intended to be construed in a manner consistent with it); S. Exec. rep. No. 96-256, 96th Cong., 1st Sess. 1979, (the new statute was to be evidence of "our national commitment to human rights and humanitarian concerns" which had not been reflected in the previous immigration Acts).

(which the Refugee Act amends) nows adopts the Convention's definition of "refugee," as well as its scheme of classifications and grants of protection for asylum and withholding of deportation, including the provisions of Article 33(1). *Id.* at 424, discussing *Stevic.*[21]

This Court found the *Handbook on Procedures and Criteria For Determining Refugee Status*, (Geneva 1979) (the "*Handbook*") to be a reliable source for interpreting the Act. *Cardoza-Fonseca*, 480 U.S. at 439 n. 22, (while not binding, the *Handbook* provides "significant guidance in construing the Protocol, to which Congress sought to conform."). The *Handbook* evolved from a request of the intergovernmental Executive Committee of the U.N. High Commissioner for Refugees ("UNHCR") -- on which the United States sits -- that the Office of the UNHCR publish a handbook for the guidance of governments as to their obligations under the Protocol. Exec. Com. Concl. No. 8 (XXVIII).[22]

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[21] Thus, the House Judiciary Committee Report stated that Congress sought "to insure a fair and workable asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations and with our obligations under international law, and [felt] it both necessary and desirable that United States domestic law include the asylum provision in the instant legislation..." *Stevic*, 467 U.S. 426 at n. 20.

[22] Article II(1) of the Protocol, like Article 35 of the Convention, places an obligation on States Parties to "cooperate" with the UNHCR and "facilitate its duty of supervising the application of the provisions of the present Protocol." Such cooperation and facilitation requires, at a minimum, that States Parties observe authoritative conclusions of the Executive Committee of the UNHCR and follow the guidelines and interpretations of the Handbook.

It is incontrovertible that the I.N.A. is to be interpreted in light of international legal obligations relating to the protection of refugees, and that actions of the United States must be consistent with this country's international legal obligations, whether they are taken within the territory of this country or beyond its territorial waters.[23]

3. The Principle of Non-Refoulement is a Universally Recognized Norm of Customary International Law Which All Countries are Bound to Apply Extraterritorially As Well As on Their Own Territory

The government asserts that Haitians outside the territory of the United States do not have a right to an asylum hearing under the laws of the United States, even when they are interdicted by ships under the jurisdiction of the United States. AI does not agree. These individuals have an inalienable right not to be sent back to Haiti in violation of the principle of *non-refoulement*; as recognized by both international law and the law of the United States. This right is in no way dependent upon their presence upon U.S.

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[23] In this regard the intergovernmental Executive Committee of the UNHCR has concluded that:
"In accordance with established international practice, supported by relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call. This practice should also be applied in the case of asylum seekers rescued at sea. In cases of large-scale influx, asylum seekers rescued at sea should always be admitted, at least on a temporary basis. States should assist in facilitating their disembarkation by acting in accordance with principles of international solidarity and burden-sharing in granting resettlement opportunities. Executive Committee Conclusion No. 23(XXXII), "Protection of Asylum Seekers in Situations of Large-Scale Influx", 32nd Session, § II(2).

territory, because it is a universally applicable norm of general international law. The United States government has no more right to violate such a norm upon the high seas than it does upon its own territory. In this regard, it is worth noting that the intergovernmental Executive Committee of the UNHCR stated in 1981 that "In cases of large-scale influx, asylum seekers rescued at sea should always be admitted, at least on a temporary basis."[24]

The special status of the principle of *non-refoulement* is indicated by the fact that Article 33 is one of only five articles of the Convention in respect of which no reservations are permitted.[25] As the International Court of Justice has recognized, when a multilateral treaty permits reservations as to certain articles and excludes the possibility of reservations as to others, it is evidence that these latter articles reflect or crystalize general rules of customary international law.[26]

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[24] Executive Committee Conclusion No. 22(XXXII), "Protection of Asylum Seekers in Situations of Large-Scale Influx", 32nd Session (1981), § II(2).

[25] See, Convention, Article 42; Protocol, Article VII. The latter provides in pertinent part that:
"At the time of accession, any State may make reservations in respect of Article IV of the present Protocol and in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention, other than those contained in articles 1, 3, 4, 16(1) and 33 thereof..."

[26] *North Sea Continental Shelf Cases*, 1969 I.C.J. 4. The opinion in that case observes:
"general or customary law rules which by their very nature, must have equal force for all members of the internal community, and cannot therefore be the subject of any unilateral exclusion exercisable at will by any of them in its favor. Consequently, it is to be expected that when, for whatever reason, rules or obligations of this order are embodied, or are intended to be reflected in

This suggests that the principle of *non-refoulement* has a legal status independent of the Convention and the Protocol.

Thus the principle of *non-refoulement* is more than just a conventional rule creating obligations for the United States and other countries.[27] It involves a fundamental right of asylum seekers; a right which like other parts of the international law of human rights, would be part of the law of the United States even had the United States had not ratified the Protocol. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980).

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certain provisions of a convention, such provisions will figure amongst those in respect of which a right of unilateral reservation is not conferred or is excluded. This expectation is, in principle, fulfilled by Article 12 of the Geneva Continental Shelf Convention, which permits reservations to be made to all the articles of the Convention "other than to Articles 1 to 3 inclusive"--these three articles being the ones which, it is clear, were then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary law ..." Id. at p. 42

[27] 107 States have ratified the Convention or the Protocol, thereby accepting the expression in Article 33(1) of the customary international norm of non-refoulement which has evolved into a principle limiting both the expulsion of refugees back to the country of origin and the rejection of refugees at a country's borders. As such, Article 33(1) is a norm-creating provision, of the type recognized by the International Court of Justice. *North Sea Continental Shelf Cases*, 1969 I.C.J. 3, 42. The widespread recognition of the binding nature of non-refoulement is further born out by its inclusion in other international instruments (see, e.g., Article 3(1) Declaration on Territorial Asylum, (Dec. 14, 1967) A/RES/2312(XXII)), and its crystallization (since the end of World War II) into a customary international norm, so that its peremptory nature is now undisputed. G. Goodwin-Gill, supra, at 297-98.

The principle had begun to achieve recognition as part of general international law even before the Convention was negotiated,[28] and it has subsequently been reaffirmed in a number of multilateral treaties and other instruments.[29] Some authorities have even argued that the principle of non-refoulement is a peremptory norm of international law, or *jus cogens*.[30] The Executive Committee of the High Commissioner's Programme, an authoritative body comprised of government representatives, and in which the United States participates, has expressed the view that "[p]ersons fleeing serious danger resulting from unsettled conditions of civil

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[28] See, Paul Weis, International Protection of Refugees, 48 Am. J. Int'l. L. 193, 198 (1954).

[29] See, American Convention on Human Rights, OAS Official Recs., OEA/ser. K/XVI/I.I doc. 65, rev. 1, corr. 2, art. 22(8), January 7, 1970; Declaration on Territorial Asylum of December 14, 1967, G.A. Res. 2312, 22 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6716, art. 3(1) (1968); Convention on the Organization of African Unity, 8 I. L. M. 1288, 1292 (1969); Convention on the Status of Stateless Persons, Sept. 28, 1954, No. 5158, 118, 360 U.N.T.S. 122, Final Act of the Conference which adopted the Convention, at 122-124. See also Article 3 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment U.N.G.A. Res. 39/46, 39 GAOR Supp. (No. 51) 197, U.N. Doc. A/RES/39/46 (1984), 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985); and Principle 5 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, adopted by the United Nations Economic and Social Council (ECOSOC) in May 1989, E.S.C. res. 1989/65, U.N. Doc. E/1989/INF/7, at 129 (1989), endorsed by the UN General Assembly in G.A. res. 44/162 of Dec. 15, 1989.

[30] See, Refugee Refoulement: The Forced Return of Haitians Under the U.S. Haitian Interdiction Agreement, Lawyer's Committee for Human Rights, (March 1990), at 57.

strife are protected from forced repatriation by a customary norm which has achieved the status of *jus cogens*."[31]

Regardless of whether the principle has been generally accepted as a peremptory norm of international law (*jus cogens*), it is clear that it has been generally accepted as a binding rule of general international law, and as such it is part of the "law of the land" in the United States. *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815). "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

C. INTERNATIONAL LEGAL STANDARDS REQUIRE THAT EACH INDIVIDUAL ASYLUM APPLICANT BE GRANTED A HEARING ON THE MERITS OF HIS CLAIM BEFORE FORCIBLE REPATRIATION CAN OCCUR

Since the right of refugees to *non-refoulement* protection is assured both by the I.N.A. and the Protocol, the question of whether the May 24th Executive Order is contrary to law cannot be determined without reference to this country's international obligations under the Protocol. Under international law the merits of a claim for protection as a refugee may not be determined in the absence of fact-finding procedures adequate to protect this fundamental right. Thus, the new U.S. policy of returning Haitian refugees to Haiti without according them the opportunity for a hearing on their asylum claims is inconsistent with the United States' binding obligations under the Protocol, and the execution of that policy should therefore be enjoined.

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[31] 1985 Report of the United Nations High Commissioner for Refugees, paragraphs 22-23, U.N. Doc. E/1985/62 (1985).

This Court has found that the Article 33(1) treaty standard is the "counterpart" of § 243(h) of the I.N.A., and that both prohibit refoulement and impose a mandatory duty not to return an alien to a country where his life or freedom would be threatened on account of one of the enumerated reasons. *Cardoza-Fonseca*, 480 U.S. at 429, 441. This interpretation is consistent with the express legislative intent that § 243(h) is "based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." H.R. Conf. Rep. No. 781, at 20.

Neither the Convention nor the Protocol describe any specific procedures for determining claims for refugee status and *non-refoulement* protection. However, since the purpose and intent of the Protocol is the protection of refugees,[32] particularly through signatories' adherence to the non-reservable obligation of *non-refoulement*, it is axiomatic that the beneficiaries of protection -- the refugee(s) defined in Article 1 of the Convention -- must initially be identified.[33]

Consequently, a refusal or failure to undertake the task of identifying refugees through appropriate procedures constitutes a failure to implement the Convention and therefore the Protocol in good faith. Article 31(1) of the

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[32] Parties to the Convention have, in its Preamble, recognized "the social and humanitarian nature of the problem of refugees" and "that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavored to assure refugees the widest possible exercise of [fundamental human rights]."

[33] The Handbook notes that "it is obvious that to enable States Parties to implement the provisions, refugees have to be identified." at 189.

Vienna Convention on the Law of Treaties[34] strongly supports this conclusion. "Good faith" implementation of treaty provisions means that states are obliged to give effective implementation to treaty norms. Some factual, evidentiary inquiry is necessarily required to evaluate the fears of asylum seekers as a predicate to making the required legal determination. Several appellate courts expressly require an asylum applicant to make a showing "by credible, direct, and specific evidence." *Alvarez-Flores*, 909 F.2d at 5, quoting *Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (9th Cir. 1986).[35]

While determining the precise form of procedures to be established is in principle left to the discretion of states, the intergovernmental Executive Committee of the UNHCR has set out the basic requirements for such procedures and in so doing, has clearly implied that a procedure is necessary and that it must conform to these basic requirements.[36] The delineation of international standards by which to judge such procedures clearly presupposes that the procedures exist and underscores the centrality of such procedures to the effective implementation of the non-refoulement norm.

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[34] U.N. Doc. A/conf. 39/27 (1969). Article 31(1) states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

[35] See also M.A. v. INS, 899 F.2d 304, 311 (4th Cir 1990 ("To validate the 'well-foundedness' of his fear, [petitioner] must set forth specific, concrete facts"); *Cruz-Lopez v. INS*, 802 F.2d 1518, 1522 (4th Cir. 1986) ("specific facts" required for objective evaluation).

[36] Executive Committee Conclusion No. (XXVII) on the "Determination of Refugee Status." These procedures are also set forth in the UNHCR Handbook.

These principles have been recognized by U.S. officials. On May 30, 1989, Ambassador John Norton Moore, then U.S. Coordinator for Refugee Affairs, stated that:

"*As a party to the UN protocol* relating to the status of refugees, my government considers it essential that the principle of nonrefoulement set forth in Article 33 of the refugee convention be applied to refugees as defined in the convention. Whether a country chooses to apply the convention definition or the "expanded" Cartagena definition of refugee in its domestic asylum practice, *asylum seekers must be given a fair opportunity to make their case for refugee status. There must be procedures for status determination that ensure that persons with valid claims are not repatriated involuntarily.* "Developing Solutions for Central American Refugee Problems", Department of State Bulletin, August 1989, p. 87 (emphasis added).

As the District Court noted, "Article 33 imposes a mandatory duty upon contracting states such as the United States not to return refugees to countries in which they face political persecution."[37] The many individual asylum claims of Haitian asylum seekers interdicted at sea depend upon the resolution of issues that raise formidable questions of fact, and a fair resolution of these claims simply cannot occur without a hearing.

D. THE INTERDICTION POLICY VIOLATES THE RIGHT OF INDIVIDUAL HAITIANS TO SEEK ASYLUM, AS RECOGNIZED BY INTERNATIONAL LAW

"Everyone has the right to *seek* and to enjoy in other countries asylum from persecution." Article 14(1) of the Universal Declaration of Human Rights, December 10, 1948,

[37] Memorandum and Order of June 5, 1992, p. 6.

U.N.G.A. Res. 217 A(III), U.N. Doc. A/810, at 71 (1948), (emphasis added, adopted unanimously with eight abstentions). While United Nations General Assembly resolutions are not in and of themselves binding on member states, these states have "pledged" themselves to observe and promote human rights and basic freedoms both in the United Nations Charter; Charter of the United Nations, Articles 55 and 56, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945; and in the Universal Declaration. Universal Declaration, Preamble.[38] Provisions of the Universal Declaration have been cited as evidence of customary international law by a number of courts, including the International Court of Justice. *Case Concerning United States Diplomatic and Consular Staff in Tehran*, Judgment, 1980 I.C.J. Reports 3, at 42, para. 91; *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980); *Golder* case, 57 I.L.R. 201, at 216-17 (1975).[39] Accordingly, the right of every person to seek asylum in another country, as expressed in the Universal Declaration is now part of customary international law, and is

[38] The obligation of all members to comply with the Universal Declaration was confirmed in two subsequent Declarations, also adopted unanimously. In Article 7 of the Declaration on the Granting of Independence to Colonial Countries and Peoples, U.N.G.A. Res. 1515 (XV) of Dec. 14, 1960, 15 U.N. GAOR, Supp. (No.16) 66, U.N. Doc. A/4684 (1961); and in Article 11 of the Declaration on the Elimination of All Forms of Racial Discrimination, 15 U.N. GAOR, Sup. (No.15) 35-37, U.N. Doc. A/5515 (1964).

[39] See also, Nuclear Tests, (New Zealand v. France), Judgment of 20 December 1974, 1974 I.C.J. 457, 487-88 (Sep. Op. Petren): "It is only an evolution subsequent to the Second World War which has made the duty of States to respect the human rights of all . . . an obligation under international law towards all States members of the international community."

thus also a part of the laws of the United States. *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

Although Article 14(1) of the Universal Declaration does not provide for a right to be granted asylum, it does demand that individuals be accorded the right to flee their countries in search of asylum elsewhere. The interdiction program denies Haitians the opportunity to exercise this right, and is therefore inconsistent with the international obligations of the United States. To facilitate and enhance the efficacy of the government's program, United States Coast Guard cutters interdict refugee vessels in the Windward Passage, immediately off the Haitian coast.[40] Interdicting at a point so close to Haiti, and nearer to Cuba and to the Bahamas than it is to the territory of the United States, the Coast Guard cannot know the destination of the refugee vessels. Refugees who may be seeking asylum in nations other than the United States, such as the Bahamas, Jamaica, or Cuba, are denied that right by the cutters which force *all* refugee ships back to the Haitian shore.[41] The Second Circuit opinion

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[40] The Second Circuit noted in the opinion below that interdiction activities were taking place primarily in the windward passage. "According to the government, the Haitians are somehow violating the INA's prohibition on illegal entry while afloat on the international waters of the Windward Passage. This argument is perplexing at best, and in any event provides no ground for sustaining the current interdiction program." *McNary*, 969 F.2d 1367.

[41] Over the years Haitians fleeing their country have been emigrating not only to the United States but to other countries as well. A large number have made their way to the Bahamas. A 1985 article referred to "the 25,000 to 40,000 Haitians estimated to be living illegally in the Bahamas", most of whom originally escaped Haiti by way of the "windward passage". See Marshall Ingwerson, Crackdown on Haitian Illegals, The Christian Science Monitor, Dec. 26, 1985, at 1.

correctly observed that "when seized, these aliens were far from, and by no means-necessarily heading for, our gates." *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1350, 1366. The result is that the "government's actions prevent the Haitians from seeking asylum in *any* country." *Id.* at 1367 (emphasis by the court). By denying Haitian refugees their right to seek asylum, and forcibly returning them to Haiti in a manner which is inconsistent with the principle of *non-refoulement*, the United States violates its international obligations under customary international law. The courts should take these commitments into account in interpreting §243(h)(1) of the I.N.A.[42] and in ruling upon the legality of the interdiction program.

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[42] The interpretative rule that an act of Congress "ought never to be construed to violate the law of nations, if any other possible construction remains..." has been recognized by this court since 1804. *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); all quoting Chief Justice Marshall in *Murray v. The Schooner Charming Betsey*, 6 U.S. (2 Cranch) 64 (1804).

CONCLUSION

For all of the foregoing reasons this Court should affirm the judgment of the Court of Appeals.

Dated: December 21, 1992

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* Counsel recognize the contribution of Joanne Mariner, a recent graduate of Yale Law School, in the preparation of this brief.

(13)

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OCTOBER TERM, 1992

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN JEWISH COMMITTEE AND ANTI-DEFAMATION LEAGUE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI

The American Jewish Committee ("AJC") is a national organization which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. Since all American Jews are either immigrants or descendants of

immigrants, if not refugees or descendants of refugees, AJC has always supported generous interpretations of immigration and refugee laws and policies. AJC, therefore, through the years has joined with other *amici curiae* in numerous cases involving such issues before the courts. The case at bar, on behalf of interdicted Haitians who are innocent victims of tragic circumstances, affords us an opportunity to do so once again.

The Anti-Defamation League ("ADL") was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL is vitally interested in protecting the civil rights of all persons and in assuring that every individual receives equal treatment under the law regardless of his or her race, religion, or ethnic origins.

As an organization rooted in the Jewish community, ADL is particularly sensitive both to political oppression and to the plight of refugees desperately seeking safe haven. ADL's involvement in this case is consistent with the mandate of its charter "to seek justice and fair treatment for all."*

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* *Amici* gratefully acknowledge the generous and insightful assistance of Norman L. Zucker and Naomi Flink Zucker, of the University of Rhode Island, in the preparation of this brief.

SUMMARY OF ARGUMENT

Amici submit this brief to assist the Court in placing the recent outflow from Haiti in historical context. The Haitian crisis is by no means the first time that the United States has had to respond to mass migration of people in distress. Recent history demonstrates that this nation can cope with the undeniable logistical difficulties while still complying with the general international standards of *nonrefoulement*, as embodied in § 243(h) of the Immigration and Nationality Act (INA).[1] Never before has this country, no matter how grave the challenges posed by mass migration, adopted a systematic policy of direct return to the country of origin without even elementary screening to identify those who are in genuine danger. For the Court to rule that the Kennebunkport Order[2] complies with domestic and international law would gravely damage a modest but sustained global effort, of which the United States has historically been a leader, to learn from the world's shamefully inadequate responses to Nazi victims—an effort enshrined in domestic and international legal commitments.

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1. 8 U.S.C. § 1253(h) (1988).
2. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992).

ARGUMENT

I.

RECOGNIZING THAT THIS COUNTRY AND OTHERS RESPONDED WITH SHAMEFUL INADEQUACY TO REFUGEES FROM FASCISM, THE UNITED STATES SINCE WORLD WAR II HAS STRIVEN TO REACT GENEROUSLY, EVEN IN THE CASE OF MASS MIGRATIONS.

Until the 1940s, the United States did not generally distinguish between refugees and immigrants. After World War II, legislation and practice increasingly incorporated that distinction, and the United States since then has granted haven to large numbers of refugees. Their arrivals were sometimes disorderly, their cultures perhaps unfamiliar, but every group did, in time, become integrated into the country, did weave itself into the American tapestry. It is a part of national history in which most Americans take a justifiable pride. But the incorporation of refugee protection into our overall system for admission of aliens has been long in coming, and it has followed an uneven course. Much of the progress reflected lessons learned from the disheartening experience of U.S. policy in the 1930s and 1940s.[3]

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3. For more extensive discussions of the evolution of United States refugee policy, *see, e.g.*, Norman L. Zucker and Naomi Flink Zucker, *The Guarded Gate: The Reality of American Refugee Policy* (1987); Gil Loescher and John A. Scanlan, *Calculated Kindness: Refugees and America's Half-Open Door, 1945-Present* (1986); Norman L. Zucker and Naomi Flink Zucker, *From Immigration to Refugee Redefinition: A History of Refugee and Asylum Policy in the United* (continued...)

A. Refugees in Europe, Rejection in America

There have always been, in the United States, strains of prejudice, nativism, and xenophobia. In the first half of this century, those strains were allowed to dominate our immigration policy, resulting in the refusal of the United States to open its doors to refugees from revolution and genocide.

Only in 1875 did Congress pass the first systematic federal restrictions on immigration. Early legislation relied on qualitative screening to keep out the undesirable, such as prostitutes or criminals, but agitation mounted for more rigid restrictions, including numerical ceilings. Restrictionist objectives were finally attained in the 1920s, with the enactment of national origins quotas. The Immigration Act of 1924,[4] more draconian than any previous legislation, set the annual quota for each nation at two percent of the U.S. population descended from that nationality, as determined by the 1890 census. That 34-year-old census was chosen as the base year because at that time few southern and eastern Europeans had come to America. Xenophobia had prevailed.[5]

3.(...continued)
States, in *Refugees and the Asylum Dilemma in the West* 54 (Gil Loescher ed. 1992); Norman L. Zucker and Naomi Flink Zucker, *The 1980 Refugee Act: A 1990 Perspective*, in *Refugee Policy: Canada and the United States* 224 (Howard Adelman ed. 1991); David A. Martin, *The Refugee Act of 1980: Its Past and Future*, in *Transnational Legal Problems of Refugees, 1982 Michigan Yearbook of International Legal Studies* 91.

4. Pub. L. No. 139, 43 Stat. 153 (1924).

5. *See* John Higham, *Strangers in the Land: Patterns of American Nativism 1860-1925*, at 300-330; Maldwyn Allen Jones, *American Immigration* 247-77 (1960).

Ironically, as the United States was thus closing its gates more tightly, the plight of refugees in Europe was becoming critical. Refugees were being spawned by the Soviet Revolution and its subsequent counterrevolutions, and Turkish persecution drove out Armenians in search of haven. But it was Adolf Hitler's capture of total power in Germany that impelled the largest flood of refugees—a flood that inspired, in many other countries, not compassion but fear.[6]

The United States responded to the refugee crisis of the 1930s, as did most other countries, by creating barriers to entrance. America would not be invaded by European refugees. Humanitarian considerations could not prevail over the engrained premises of the national-origin quota system. The face of restriction in that era sat solidly on a body of time-honored economic argument and unyielding prejudices.

When there had been an abundance of jobs and a need for labor, immigrants had been welcome. With that era's scarcity of jobs, however, immigrants—and refugees were simply thought of as immigrants—were no longer welcome. America, confronting massive unemployment and social and economic breakdown, was reluctant to share with the stranger.

Economic arguments were reinforced by one-hundred-percent Americanism. Nativism, which had recently triumphed in the quota legislation, remained a vigorous force throughout the Depression and the war years, and was buttressed by anti-Semitism. Many of the refugees were Jews, and anti-Semitism

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6. *See* Michael R. Marrus, *The Unwanted: European Refugees in the Twentieth Century* 51-81, 122-158 (1985).

became a significant factor in opposing refugees, and in the defeat of legislation to admit refugees.[7]

For example, the 1939 Wagner-Rogers bill proposed the admission of twenty thousand German refugee children, under age fourteen, on a nonquota basis over a two-year period. To avoid provoking anti-Semitism, the bill was deliberately termed a *German*, rather than a *Jewish*, refugee children's bill, while the public committee created to support the bill was carefully called the Non-Sectarian Committee for German Refugee Children. It enjoyed a major outpouring of humanitarian support. But the humanitarian outpouring met a wall of nativist resistance. Despite the nonsectarian cast of its title and the restrained modesty of its objectives, most people perceived the bill as intended for the rescue of Jewish children. The refugee-children bill died in committee.[8] One year later, Congress managed to pass a measure to allow the entrance of British children.[9]

Official Washington had followed, or perhaps shaped, public opinion. The Department of State had opposed the children's bill. The Labor Department had waffled, neither supporting nor opposing it. Franklin D. Roosevelt, in the White House, had

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7. *See* David S. Wyman, *The Abandonment of the Jews: America and the Holocaust 1941-1945*, at 6-9 (1984).
8. *See* Barbara McDonald Stewart, *United States Government Policy on Refugees from Nazism: 1933-40*, at 518-47 (1982).
9. *See The Guarded Gate*, *supra* note 3, at 19-21. The measure that passed provides in general terms for the screening and transport of "refugee children," Pub. L. No. 770, 54 Stat. 866 (1940), but the legislative history made clear that the authority would be used for children from Britain endangered by German bombardment. *See* David S. Wyman, *Paper Walls: America and the Refugee Crisis 1938-1941*, at 116-28 (1968).

remained eloquently silent. No less than the Congress, the executive formulated refugee policy. The Congress did so by perpetuating legislative barriers. The executive constructed, in historian David S. Wyman's felicitous term, "paper walls."[10] After the war began, the State Department impeded the intake of refugees by imposing stricter administrative requirements. The department instructed its overseas processing staff to withhold visas from anyone about whom they had "any doubt whatsoever." A circular telegram amplified the new policy:

> [A]lthough a drastic reduction in the number of quota and nonquota immigration visas issued will result therefrom and quotas against which there is a heavy demand will be underissued, it is essential to take every precaution at this time to safeguard the best interests of the United States.[11]

The paper walls, under Assistant Secretary Breckenridge Long, grew insurmountable. In a memorandum, he spelled out his modus operandi:

> We can delay and effectively stop for a temporary period of indefinite length the number of immigrants into the United States. We could do this by simply advising our consuls to put every obstacle in the way and to require additional evidence and to resort to various administrative advices which would postpone and postpone and postpone the granting of the visas.[12]

10. *Id.*
11. *Id.* at 174.
12. *Id.* at 173.

Long's insistence on calling the harassed people fleeing for their lives *immigrants* rather than *refugees* cloaked a harsh policy in a facade of reasonableness.

To a large extent, administrative reluctance to admit refugees reflected an unwillingness to recognize that for the refugees future dangers were quite real. In a well-known and tragic incident in 1939, the *SS St. Louis* sailed from Hamburg with hundreds of passengers seeking escape from Germany. Denied permission to discharge its human cargo at its original destination in Cuba, the ship proceeded to the Florida coast. An American Coast Guard cutter patrolled the waters there to prevent anyone on the refugee ship from trying to reach shore.[13] The desperate passengers sent a wire to President Roosevelt, but he did not respond. The State Department, fearing that a precedent would be set, ruled that no one without a proper visa could land; none of the passengers had visas valid for the United States. The *St. Louis* ultimately returned to Europe, where some of its passengers eventually became part of Hitler's "final solution."[14] Even in this stunning failure of American compassion, however, the United States government did not forcibly return the rejected asylum seekers directly to the government they had so recently escaped.

The will of the United States to admit refugees had been tested, and we had failed the test. Fear, prejudice, indifference, inertia, economic distress had, in the end, formed a wall, a wall that even the highest government officials had no desire to breach.

13. Stewart, *supra* note 8, at 442.
14. For the story of the *SS St. Louis*, *see* Gordon Thomas and Max Morgan Witts, *Voyage of the Damned* (1974).

B. After World War II: Learning Some of the Lessons

Revulsion at the full scope of Nazi persecution, fully revealed upon the defeat of the Axis powers, started this country on a long, uneven effort to build a better legal structure that might guarantee responsiveness to future refugee needs. President Harry S. Truman initiated this evolution. With the surrender of Hitler's military, Truman was faced with an old phenomenon under a new name -- displaced persons (DPs). Responding to their misery, he issued a presidential directive that eased their immigration under existing quotas.[15] But the directive could cover only a small number of DPs, and Truman asked Congress, for humanitarian and foreign policy reasons, to enact DP legislation. The Displaced Persons Act of 1948 was the first significant refugee legislation in American history.[16] Amended in 1950 and extended in 1951, it made possible the admission of more than four hundred thousand refugees.[17] Though the numbers of needy people displaced in Europe in the wake of global war might have appeared overwhelming, America did not shrink from a major resettlement effort.

C. Refugees from European Communism

The pressures—guilt and humanitarianism—that eased the admission of the DPs were soon supplemented by other concerns, as Communist expansionism gave refugees strategic importance. Refugee-escapees who "voted with their feet" against Communism were seen to offer proof of the inadequacies of the

15. *Reprinted in* 13 Dept. of State Bull. 981 (1945). *See* Loescher and Scanlan, *supra* note 3, at 5-6.
16. Pub. L. No. 774, 62 Stat. 1009.
17. *From Immigration to Refugee Redefinition*, *supra* note 3, at 57-58.

Communist system and the strength of democracy. Both the Truman and Eisenhower administrations encouraged refugees to come to the United States. Congress also was committed to encouraging escape from Communism, even to the extent of abandoning established numerical limits and quotas and allocating funds for escapee assistance.[18]

The Refugee Relief Act (RRA) of 1953, Pub. L. No. 203, 67 Stat. 400, relaxed United States immigration law. Congress ignored the long-established national quotas and instead authorized the issuance of over 200,000 nonquota visas for persons escaping from Iron Curtain countries -- something it had been unwilling to do for 20,000 children just 14 years earlier. In 1956 the President authorized the first mass parole of refugees into the United States. That year, just before the expiration of the RRA, Soviet troops crushed an anti-Communist revolt in Hungary, sending thousands of Hungarians into neighboring Austria. Some were given visas under the RRA; others, however, at President Eisenhower's direction, were admitted under the theretofore obscure parole power of the Attorney General.[19] President Eisenhower authorized their admission to the United

18. *See* Congressional Research Service, 96th Cong., 2d Sess., *Review of U.S. Resettlement Programs and Policies* 7-11 (Comm. Print, Sen. Comm. on the Judiciary, 1980).
19. The parole power, long an administrative practice, was given statutory sanction in § 212(d)(5) of the Immigration and Nationality Act (INA), now codified at 8 U.S.C. § 1182(d)(5) (1988). On the evolution of the parole power, its use for refugee programs, and the controversy over that use, *see* Thomas Alexander Aleinikoff and David A. Martin, *Immigration: Process and Policy* 347-52, 709-10 (2d ed. 1991).

States, and the American public mustered a warm welcome for over thirty thousand Hungarian "freedom fighters."[20]

The Refugee-Escapee Act of 1957, Pub. L. No. 85-316, 71 Stat. 639, which admitted still more Hungarians, significantly defined refugee-escapees as victims of racial, religious, or political persecution who were fleeing Communist or Communist-dominated countries, or a country in the Middle East. This ideologically and geographically limited definition, perpetuated in the 1965 amendments to the INA,[21] would stand until the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, replaced it with a more neutral definition based on the UN Convention and Protocol relating to the Status of Refugees.[22]

But even under the Refugee Act, the number of refugees admitted to the United States from the Soviet bloc remained large. In the 1970s, when Soviet emigration policy softened, in apparent keeping with the progress of U.S.-Soviet détente, the United States stepped up its resettlement program for those finally able to leave, most of whom were Soviet Jews. The number of Soviet refugees admitted yearly has varied largely according to Kremlin decisions. From a high exceeding 50,000 in 1979, the total declined to 640 in 1984, but attained 50,000

20. *Id.* at 709.
21. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911, 913 (amending former section 203(a)(7) of the INA).
22. Convention relating to the Status of Refugees, done July 28, 1951, 189 U.N.T.S. 137, *as modified by* the Protocol relating to the Status of Refugees, done Jan. 31, 1967, 606 U.N.T.S. 267, 19 U.S.T. 6223, T.I.A.S. No. 6577.

again in 1990. Between 1975 and the end of 1991, over a quarter of a million Soviet citizens resettled in the United States. And now, even with the end of the Soviet Union, the United States does not shrink from assisting a remarkably large-scale ongoing migration. In fiscal year 1992, the number to be admitted was set at 61,000, and actual admissions apparently came close to that figure. For FY 1993, the United States has announced a willingness to admit 50,000 nationals of the former Soviet Union.[23]

D. Cuban Refugees: The United States Joins the Ranks of First Asylum Countries

When Fidel Castro came to power in Cuba in 1959, the United States again found ways to welcome refugees. It became, in the process, a country of first asylum. Over the years, America would receive at least 900,000 Cubans, but even when the Mariel boatlift of 1980 greatly strained America's receptiveness, this country never adopted a policy of interdiction, much less of unscreened returns. Indeed, to this day the United States policy remains decidedly open to potentially uncontrolled numbers of arrivals from Cuba, who are now readily granted asylum and legal protection.

From the early days of the Castro revolution until the break in diplomatic relations in January 1961, Cubans moved directly to the North American mainland, initially as the beneficiaries of

23. U.S. Department of State, Office of the U.S. Coordinator for Refugee Affairs, *Proposed Refugee Admissions for Fiscal Year 1993* (Washington, D.C., June 1992), at 18; Presidential Determination No. 93-1, 57 Fed. Reg. 47,253 (Oct. 2, 1992) (setting refugee admission numbers for FY 1993).

an extraordinarily liberal nonimmigrant visa policy at the U.S. consulate in Havana. Once here they benefited from a variety of administrative measures that gave them an indefinite stay—in effect, automatic political asylum. These policies persisted even though arrivals, sometimes reaching 1500 per week, greatly strained the facilities for reception and assistance in south Florida.[24] As in other refugee situations this nation has faced, the reception and resettlement process posed difficult challenges, but federal and state governments found ways to cope. Eventually Congress passed the Migration and Refugee Assistance Act of 1962,[25] still in effect, to establish a more solid foundation for continued assistance.

Castro's suspension of air travel in response to the 1962 Cuban missile crisis brought a relative lull in Cuban migration to the United States, after perhaps a quarter million Cubans had left.[26] But in late 1965, responding to new signals from Havana, President Johnson announced a major new initiative. At the signing of the historic 1965 amendments to the Immigration and Nationality Act, in a ceremony held at the Statue of Liberty, he proclaimed the start of a massive new refugee parole program, the Cuban freedom flights,[27] a program that brought 270,000 Cubans directly to the United States before its termination in 1973. Another 70,000 came in from Spain under a separate parole program.

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24. *See* Loescher and Scanlan, *supra* note 3, at 61-75.
25. Pub. L. No. 87-510, 76 Stat. 121 (codified, as amended, at 22 U.S.C. §§ 2601-2606 (1988)).
26. Loescher and Scanlan, *supra* note 3, at 70-71.
27. *See* 1 *Weekly Comp. of Pres. Doc.* 364-67 (Oct. 3, 1965); *id.* at 470-74 (Nov. 15, 1965).

Under President Carter, relations with the Castro government warmed somewhat, and consideration of new refugee programs became possible. Neither side sought to restore the freedom flights, but a special parole program brought some 10,000 former political prisoners and family members to this country.

In 1980, the United States encountered the most chaotic and difficult episode in its history of receiving Cuban refugees: the Mariel boatlift. The crisis began when over 10,000 Cubans rushed in to the Peruvian embassy in Havana seeking diplomatic asylum. Their plight gained widespread attention and sympathy throughout the hemisphere. Seeking to undo this political setback, Fidel Castro launched a diversion. He announced that the port of Mariel on Cuba's north shore would be open for Cuban exiles to come and pick up relatives who wanted to leave the island. Because the cut-off of the freedom flights had left numerous families separated, this invitation attracted thousands of boats south from Florida. When they arrived, some relatives were allowed to board, but the Cuban government added an especially cynical exploitation of the family members who had sent the boats southward. It took the occasion to force aboard the vessels in Mariel thousands of other persons not sought by the captains, including many who had been convicted of common crimes, escorted to the port directly from jails and prisons, and others from mental health facilities.[28]

Before the Carter Administration implemented policies to stop the southbound boat flow, enough vessels had reached Mariel to bring 125,000 Cubans eventually to Florida, over the course of a few months in mid-1980. Their arrival coincided with

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28. *See The Guarded Gate*, *supra* note 3, at 58-71.

the peak of a more modest boat flow from Haiti that had been picking up momentum over the previous few years. Scrambling to respond, the U.S. government established a special Cuban-Haitian task force and employed military bases at several locations throughout the United States (many of which had been used for the emergency Vietnamese resettlement five years earlier) as initial centers to house and care for the arrivals and to perform the necessary processing. Those arriving were granted a special parole status (known as Cuban-Haitian entrant), and eventually Congress passed legislation permitting their adjustment to lawful permanent resident status.[29]

The Mariel experience was especially traumatic for this country. The arrival was massive and sudden, it came in the midst of a hotly contested presidential election campaign, and the percentage of Marielitos with criminal backgrounds made camp management and eventual placement especially difficult. It is quite likely that this bitter experience contributed to the Bush Administration's resolve to issue the Kennebunkport Order in May 1992 returning all Haitian boat passengers directly to Haiti.

But a different lesson should be drawn. The 1991-92 Haitian movement shares few similarities with Mariel. The flow from Haiti is spontaneous, coming in Haitian boats; there has been no manipulation of U.S.-based family members urging them to send American vessels for rescue. As a result, there is no opportunity

29. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 202, 100 Stat. 3359. A brief summary of the Cuban-Haitian entrant program and related legal developments appears in Aleinikoff & Martin, *supra* note 19, at 412-13, 436-37. *See also* Ronald Copeland, *The Cuban Boatlift of 1980: Strategies in Federal Crisis Management*, 467 *The Annals* 138 (1983).

for an adversary government to send convicted criminals to this country. And the unprecedented outpouring of support in this hemisphere for restoration of the democratically elected Aristide government[30] opens prospects for medium-term resolution of the crisis through political and diplomatic means that were not remotely possible with regard to Cuba in 1980. Although any large-scale movement entails considerable logistical problems, which *amicus* does not minimize, Mariel certainly proved that the United States government is capable of responding even in highly unfavorable circumstances.

E. Cubans and Haitians: Radically Unequal Treatment

Whatever may have been the appropriate lessons of Mariel, it is undeniable that the U.S. government since then has applied any negative teachings to Haitians, while maintaining to this day a policy of near-automatic asylum for those Cubans who manage to leave the island. While Haitians were hindered, deterred and often subjected to discriminatory treatment, Cubans have been almost uniformly welcomed. With the introduction of the Haitian Migrant Interdiction Program in 1981, the disparity in treatment

30. The Meeting of Ministers of Foreign Affairs of the Organization of American States, convening shortly after the Haitian coup, adopted unprecedentedly interventionist resolutions calling for restoration of the democratically elected government and imposing a hemispheric embargo. *See* OEA/Ser.F/V.1, MRE/RES. 1/91 corr. 1 (3 Oct. 1991) and OEA/Ser.F/V.1, MRE/RES. 2/91 (8 Oct. 1991). The Executive Order implementing the embargo for the United States was Exec. Order 12,779, 56 Fed. Reg. 55,975 (Oct. 28, 1991). *See generally* Pamela Constable, *Dateline Haiti: Caribbean Stalemate*, 89 Foreign Policy 175 (1992-93).

widened to a chasm.[31] The Reagan Administration often justified the difference based on the "foreign policy aspects" of the migrations. The Cubans, it was said, had been forced out by a totalitarian and unfriendly government. The Haitians, on the other hand, came by choice from a country whose "friendly government [that of Jean-Claude Duvalier] is interested in enforcing its laws and wishes to cooperate with the United States in bringing illegal migration under control . . . ."[32] This policy, at best, skirted the edges of U.S. law, ignoring the Refugee Act's promise of asylum to all who met a nonideological standard meant for evenhanded application. But the early versions of the interdiction program at least allowed for some screening, aboard the Coast Guard cutters, of possible refugee claims (however inadequate such screening may have been). With the Kennebunkport Order, any attempt to honor the requirements of U.S. and international law through pre-return screening was abruptly halted.

The treatment of Cubans stands in stunning contrast. Although the Cuban government now polices against illicit departures, Cubans continue to escape the country on boats, rafts and other makeshift vessels. In recent years, many of those craft have first been spotted by a group of volunteer pilots who regularly patrol the skies over the Florida straits; when a boat is sighted, the Coast Guard is notified. It is cruelly ironic that most

31. *See* Lawyers Comm. for Human Rights, *Refugee Refoulement: The Forced Return of Haitians Under the U.S.-Haitian Interdiction Agreement* (1990).

32. *The United States as a Country of Mass First Asylum: Hearing Before the Subcomm. on Immigration and Refugee Policy of the Sen. Comm. on the Judiciary*, 97th Cong., 1st Sess. 3 (1981) (testimony of Thomas O. Enders, Assistant Sec'y of State).

of the 2,205 Cuban refugees who arrived in the United States and received legal status this past year (the highest total since 1980) had been rescued at sea by U.S. Coast Guard vessels, the same Coast Guard that patrols the waters around Haiti to seek out and return any escaping Haitians.[33]

F. Southeast Asians: An Ongoing Legacy of the Vietnam War

It may have been a quiet guilt about the loss of the war in Vietnam that prompted the largest and most sustained U.S. program in response to a mass migration: the effort to resettle Southeast Asian refugees. In the spring of 1975 the Saigon government disintegrated as Vietcong and North Vietnamese troops advanced, and a chaotic exodus ensued. There was no thought in U.S. government circles of containing the exodus or forcing return, though the disorderly migration posed enormous problems. Instead, President Ford promptly created a special interagency task force for the evacuation and resettlement of Indochinese refugees. In a brief period in 1975, some 135,000 were evacuated and screened on Guam and Wake Island, and processed through reception centers (mostly underused military bases) in the United States. By the end of that year, the temporary refugee relocation camps had been closed, the outflow

33. *See Refugee Reports*, October 30, 1992, at 15. The government has often justified its blanket policy of accepting arriving Cubans by pointing to the Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161, as amended, 8 U.S.C. § 1255 note (1988). But that Act does not *mandate* legal status for arriving Cubans; it merely authorizes the adjustment of status to lawful permanent resident one year after admission or parole, *in the discretion of the Attorney General*.

was down to a trickle, and it appeared that the Southeast Asian refugee problem would fade from the national consciousness.[34]

But the agony of Southeast Asia was not over. By late 1977, the press was beginning to speak of a new phenomenon, the so-called "boat people" from Vietnam. These exiles endured great risks and privation on the high seas in an effort to escape, but were increasingly rebuffed by passing ships and resisted by potential haven states in the region. Rising numbers of people also were heading for Thailand overland, not only from Vietnam but also from Laos and Cambodia. The American response was not to despair of coping with the problem or to seek to bottle people up inside their homelands. Instead the U.S. government led efforts to assure immediate reception by the first-asylum states in the region and to condemn those instances where receiving states pushed off boats or forced land refugees back across the border.[35]

In 1978 much larger vessels, including the *Southern Cross*, *Tung An*, *Huey Fong*, and *Hai Hong*, each bearing hundreds or thousands of refugees, appeared in the South China Sea. They marked the undeniable beginning of a new and massive outmigration, sometimes exceeding 50,000 per month. The United States took the lead in pressing first-asylum states to allow entry and other nations to accept distant resettlement. The high point of U.S. leadership may have been the Carter Administration's surprise offer at a 1979 conference of up to 14,000 resettlement spaces per month.[36] It was not easy for the government to provide the overseas processing, transportation,

34. *See* Loescher & Scanlan, *supra* note 3, at 102-19.
35. *Id.* at 120-46.
36. *See id.* at 137-46.

and support upon arrival needed to deliver on this promise. But the effort went forward, eventually calling into existence a new office, the U.S. Coordinator for Refugee Affairs, and new domestic resettlement and support arrangements embodied in title III of the Refugee Act of 1980.[37]

Although the Indochinese exodus is now winding down, difficult issues continued into the 1990s. A particular focus was Hong Kong, which began in the late 1980s to receive, on its limited land mass, a major new flow of Vietnamese boats, carrying tens of thousands of asylum seekers. Ultimately, an international conference convened by the UN High Commissioner for Refugees (UNHCR), with active involvement by the United States, developed what is known as the Comprehensive Plan of Action.[38] It provides for screening of all arrivals throughout the region according to established legal standards. Those found to satisfy the "well-founded fear of persecution" test of the UN Convention are eligible for onward resettlement. Blocking resettlement for those who fall short is meant to discourage future unauthorized arrivals. Meantime an in-country option is available in Vietnam; those who believe that they are at risk can apply within the country for the Orderly Departure Program. Nothing in the Comprehensive Plan remotely contemplates seaborne interdiction followed by direct return. In fact, the U.S. government has even insisted that the British government (Hong Kong is a British dependency) should not return to Vietnam those *screened out*, though our diplomats have not suggested that this group should have been found to meet the international refugee

37. INA §§ 411-414, 8 U.S.C. §§ 1521-24 (1988).
38. The Comprehensive Plan of Action is reprinted in 1 Int'l J. Refugee Law 574 (1989).

definition. The U.S. government has not insisted upon the full protections of asylum nor access to onward resettlement for this group, but it has adamantly resisted any plan for involuntary return.[39]

G. Central American Refugees: Eventual Safe Haven for Some

This country's treatment of refugees from Central America over the past decade has been highly controversial. But even in this sensitive policy realm, the political branches have demonstrated that the prospect of massive numbers need not prevent the application of legal guarantees, sometimes highly generous and protective ones. Until one year ago, El Salvador was in the throes of a protracted and bloody civil war, marked by significant human rights abuses. Thousands of Salvadorans had migrated north in response. After years of debate over the subject, Congress finally decided in 1990 to provide new safe-haven protection, known as temporary protected status (TPS), under INA § 244A, 8 U.S.C. § 1254a (Supp. III 1991), to Salvadorans who were in this country as of Sept. 19, 1990. Immigration Act of 1990 § 303, 8 U.S.C. § 1254a note (Supp. III 1991). This enactment provided Salvadorans with work authorization and protection against deportation for 18 months. Congress voted this benefit even though estimates of the numbers of Salvadorans illegally in this country ran as high as 500,000.[40]

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39. *See* Aleinikoff & Martin, *supra* note 19, at 728-30.
40. *See, e.g.*, Sen. Alan K. Simpson, *We Can't Allow All Salvadorans to Stay*, Wash. Post, July 10, 1984, at A13. In the end, approximately 200,000 Salvadorans were granted TPS. *U.S. Will Defer Departure of Salvadorans, but Will Not Extend TPS*, 69 *Interpreter Releases* 600 (1992).

Upon the expiration of the statutory TPS period, President Bush decided to grant similar benefits for an additional year under the functionally similar rubric of "deferred enforced departure," in order to avoid disrupting the ongoing efforts to establish a stable peace in El Salvador.[41]

Guatemala also has been suffering from a prolonged civil war, accompanied by widespread human rights abuses. Although neither Congress nor the executive branch has seen fit to extend TPS to Guatemalans, the Department of Justice did voluntarily include extensive procedural rights for Guatemalans in a comprehensive settlement of a class-action lawsuit challenging previous asylum processing.[42] This settlement covered both Salvadorans and Guatemalans, and it gave virtually all such persons in the United States before a stated cut-off date the right to have their asylum claims heard or reheard de novo by a newly created corps of asylum officers established by regulations issued in July 1990.[43] The kind of screening implicitly required by the court of appeals in this case before anyone may be returned to Haiti is surely no more burdensome in character than the program extended with the Justice Department's consent to approximately 42,600 Guatemalans.[44]

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41. *See id.*
42. *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).
43. 55 Fed. Reg. 30,674 (1990) (principally codified in 8 C.F.R. part 208 (1992)).
44. *See March 31 Asylum Deadline Approaches for ABC Guatemalans*, 69 *Interpreter Releases* 348 (1992). The Salvadoran beneficiaries of the settlement consisted primarily of those eligible for TPS.

II.

EVEN IN PERIODS WHEN THE UNITED STATES HAS BEEN INVOLVED IN RESPONDING TO MASS MIGRATIONS, IT HAS PAID CAREFUL ATTENTION TO STRENGTHENING THE LEGAL GUARANTEES FOR REFUGEES.

The account presented here reveals numerous instances where the United States has implemented a lesson of generosity or simple humanitarian responsiveness learned from the failures of refugee policy in the 1930s and 1940s. Significantly, throughout the postwar period this country has also moved to strengthen legal guarantees—even at the times when massive movements might have been thought most likely to induce reluctance about undertaking commitments of that sort.

The United States played a significant role in the negotiation and shaping of the 1951 Convention relating to the Status of Refugees. Drafted while Europe was still suffering the lingering effects of World War II, and while the United States was resettling 400,000 people under the Displaced Persons Act, this instrument nonetheless was explicitly designed to provide firm legal guarantees for Europe's displaced.[45] The daunting scope of the problem did not bring the process of legal protection to a halt. Disappointingly, after its early activism, the United States did not become a party to the Convention, but this failure might be attributed largely to independent domestic controversies in the 1950s over the Bricker Amendment, which threatened

45. *See generally* 1 Louise Holborn, *Refugees: A Problem of Our Time: The Work of the United Nations High Commissioner of Refugees* 153-73 (1975).

considerable retrenchment of U.S. treaty powers.[46] Nonetheless, the United States continued to voice support for the treaty's standards, and it retained an active role in the UNHCR executive committee.

In 1968, the United States finally ended its standoffish posture toward the international refugee treaties, by acceding to the UN Protocol. Although this occurred during a high point of the freedom flights bringing Cubans directly to the United States—clearly manifesting our potential as a first asylum country—President Johnson emphasized in his letter of transmittal sending the treaty to the Senate: "Foremost among the humanitarian rights which the Protocol provides is the prohibition against expulsion or return of refugees to any country in which they would face persecution."[47] The Senate readily approved the treaty.[48]

Twelve years later, in the Refugee Act of 1980,[49] the United States completely recast its domestic legal structure governing both overseas admissions and political asylum. This too was no fair-weather document built on assumptions that

46. *See generally* Natalie Hevener Kaufman & David Whiteman, *Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment*, 10 *Human Rights Q.* 309, 310-12 (1988).

47. *Message from the President of the United States transmitting the Protocol Relating to the Status of Refugees, Done at New York on January 31, 1967*, Exec. K, 90th Cong., 2d Sess., at iii (1968).

48. *See Protocol Relating to Refugees*, Exec. Rept. No. 14, 90th Cong., 2d Sess. (1968) (Committee report and hearing transcript considering the Protocol).

49. Pub. L. No. 96-212, 94 Stat. 102 (codified in various sections of 8, 22 U.S.C.).

refugee situations would be easily managed. Instead, most of the drafting and legislative work occurred during 1979, precisely the period when the outflow from Indochina was at its chaotic peak. Despite this situation, Congress explicitly decided to change INA § 243(h) from a discretionary to a mandatory provision, in order to bring it into line with the *nonrefoulement* guarantee of Article 33 of the UN Convention.[50]

III.

THE HISTORY OF U.S. RESPONSE TO MASS REFUGEE MIGRATIONS SINCE WORLD WAR II REVEALS THAT THE LEGAL GUARANTEES ENFORCED BY THE COURT OF APPEALS ARE ENTIRELY CONSISTENT WITH REALISM ABOUT SUCH MOVEMENTS.

The foregoing history places the May order interdicting Haitian asylum seekers in a revealing light. This is by no means the first time that the United States has been challenged to deal with potentially chaotic human migrations from countries marked by turmoil and human rights abuses. The government has consistently found ways to cope humanely with the arrival of tens of thousands of refugees and asylum seekers. Most of the 900,000 Cubans resettled since Castro's revolution have come directly from that island; though the process was sometimes messy and difficult, the challenge did not overwhelm U.S. responsiveness. When Saigon fell in 1975, American ingenuity found ways to move large numbers to Guam and Wake Island,

50. *See* H.R. Rep. No. 96-781, 96th Cong., 2d Sess., at 20 (Conference Report on the Refugee Act of 1980); Martin, *supra* note 3, at 101, 109-10.

eventually resettling over 135,000 who had fled in the space of just a few weeks. In the midst of these crises, the United States has steadily continued an ongoing process of strengthening legal protections for refugees; its role has been realistic but constructive. Only with the Kennebunkport Order has it departed so dramatically from the hard-won heritage of the last 45 years.

Amici do not minimize the dilemmas created by the sudden and unplanned appearance of large numbers of asylum seekers. But affirmance of the judgment of the court of appeals would leave the United States with numerous options for dealing with such situations. It would foreclose but one path—the return of asylum seekers, without any attention to the nature of their claims to refuge, directly to the authorities of the country where they risk persecution. This path, as the court of appeals concluded, and as the respondents and other *amici* have demonstrated, was deliberately closed by the decision of Congress, embodied in INA § 243(h), 8 U.S.C. § 1253(h) (1988), acting to honor the painstakingly won advance of refugee protections since World War II.

CONCLUSION

For the foregoing reasons, *amici* American Jewish Committee and Anti-Defamation League urge that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1992

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR NICHOLAS DeB. KATZENBACH, BENJAMIN R. CIVILETTI, AND GRIFFIN BELL, FORMER ATTORNEYS GENERAL OF THE UNITED STATES OF AMERICA, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether Section 243(h)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h)(1), which forbids the Attorney General from "deport[ing] or return[ing] any alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of * * * political opinion," applies to aliens who have been intercepted by government officials on the high seas.

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INTEREST OF THE AMICI CURIAE[1]

This case concerns the scope of Section 243(h)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h)(1), which forbids the Attorney General from returning any alien

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

to a country if he determines that such alien faces persecution or death in such country on account of political opinion. The amici are former Attorneys General of the United States who, in that capacity, were responsible for administering the immigration laws of the United States. Accordingly, the amici are acquainted with the administration and enforcement of the immigration laws, as well as with their practical effect on the operations of the Executive Branch. They therefore have a continuing interest in the question presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

On May 24, 1992, President George Bush issued Executive Order, No. 12,807, which authorizes the Coast Guard "[t]o stop and board defined vessels * * * [and t]o return the vessel and its passengers to the country from which it came * * *." 57 Fed. Reg. 23,133, 23,133-134 (1992). In the view of the amici Attorneys General, Executive Order 12,807 flatly violates Section 243(h)(1) of the Immigration and Naturalization Act (INA), 8 U.S.C. § 1253(h)(1). As we show below, that Section unambiguously forbids Executive officials from intercepting aliens on the high seas and returning them to another country without first determining that those aliens would not be returned to conditions of persecution.

1. The text of Section 1253(h)(1) is dispositive. In plain terms, Congress extended statutory protection to "any alien," wherever he may be found, whether on the high seas or elsewhere. Congress' use of "any" sweeps broadly, foreclosing the narrow construction urged by petitioners. Moreover, by prohibiting both "deportations" and "returns," Section 1253(h)(1) extends its protections to aliens everywhere – not just those who reach our shores.

2. The scope of Section 1253(h)(1) reflects Congress' carefully crafted decision in 1980 to *jettison* the very

limitations on which petitioners now rely. First, Congress added to Section 1253(h)(1) the words "or return," thereby prohibiting not only the *deportation* of aliens from the United States, but also the *return* of aliens to their native land from outside the United States. Second, Congress struck from the statute the phrase "within the United States," thus making clear that Section 1253(h)(1) applies to aliens both within and without the United States. And finally, Congress deleted prior permissive language in favor of the present command of the statute, prohibiting the Attorney General from deporting or returning aliens to conditions of persecution abroad.

3. These statutory changes assume additional interpretive force when the resulting language is compared with the many other sections of the INA in which narrower language appears. Indeed, at the very same time that the phrase "within the United States" was *excised* from Section 1253(h)(1), Congress *added* that phrase to other portions of Section 1253(h). Under ordinary principles of statutory construction, Congress' parallel enactments confirm the evident breadth of Section 1253(h)(1).

4. Petitioners' reliance on the presumption against extraterritorial application of United States law is misplaced. That presumption applies only when congressional intent to extend United States law extraterritorially is unclear, and only when extraterritorial application might infringe on the sovereignty of another nation. Neither precondition exists in this case. First, congressional intent to apply Section 1253(h)(1) extraterritorially is clear, given not only the statutory language, but also the subject matter covered by the statute – matters that are distinctly international in scope, and that seek to effectuate an international human rights obligation undertaken by the United States. Second, no comity concerns are implicated when, as here, the statute in

question governs United States conduct on the high seas, where no other nation exercises jurisdiction.

5. Finally, the language of Article 33.1 of the United Nations Convention Relating to the Status of Refugees, on which Section 1253(h)(1) was modeled, confirms the court of appeals' reading of Section 1253(h)(1). The language of Article 33.1 prohibits both expelling and returning a refugee. To avoid redundancy, this language can only be read to protect those refugees who are under the control of a Contracting Nation, whether within or without its borders. Further, the use of the term "refugee" in other contexts in the Treaty reflects the Treatymakers' intention to define "refugee" broadly in Article 33.1.

In particular, *amici* wish to stress the distinction between considerations of foreign policy (which are vested in the President) and the dictates of statutory law (which are set by the Congress). In the background of this case are serious and heartfelt disagreements about appropriate policy toward refugees from nations striven by political turmoil and oppression as well as plagued by chronic and desperate economic deprivation. Some believe (with the President) that the best course is to discourage mass exodus and work for political and economic reform. Some believe (with Respondents and their supporters) that basic humanitarian decency precludes such a course. While each of these *amici* entertain strong but differing beliefs on this question of foreign policy, we are united in the conviction that this case must be resolved not according to those beliefs, but by the law. Neither the humanitarian entreaties of Respondents nor the foreign policy concerns of Petitioner can or should override what – in our view – is the plain and unambiguous meaning of the statute governing this matter. We will therefore confine ourselves to dry issues of statutory language, in the firm conviction that the duty and authority

of the President to "take Care that the laws be faithfully executed" is defined by the words found in Acts of Congress.

ARGUMENT

SECTION 1253(h)(1) UNAMBIGUOUSLY APPLIES TO ALIENS INTERCEPTED ON THE HIGH SEAS

This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut National Bank* v. *Germain*, 112 S. Ct. 1146, 1149 (1992) (citations omitted). As the Court recently reiterated, "the legislative purpose is expressed by the ordinary meaning of the words used." *Ardestani* v. *INS*, 112 S. Ct. 515, 520 (1991) (citations and internal quotations omitted). This fundamental principle applies in construing the INA, no less than it does in other statutory contexts. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 431 (1987); *INS* v. *Phinpathya*, 464 U.S. 183, 189 (1984). Under this well-settled principle, Section 1253(h)(1) plainly applies to aliens who have been intercepted on the high seas.

1. 8 U.S.C. § 1253(h)(1) provides in relevant part:

> The Attorney General shall not deport or return any alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

There is no basis in the text of the statute for carving out an exception in the case of aliens apprehended on the high seas. By its terms, Section 1253(h)(1) applies to "any" alien, wherever he may be found, whether on the high seas or

elsewhere. The term "any" means just what it says – *any* alien, including those found on the high seas. As this Court has made clear, Congress' use of the word "any" in identifying the subject of a statute serves to "undercut[] a narrow construction" of the statute's scope, because "[i]t is difficult to imagine broader language" signifying Congress' intent. *United States* v. *James*, 478 U.S. 597, 604-605 (1986).

But Congress has not simply extended the protections of Section 1253(h)(1) to "any" alien. It has also emphasized that those protections cover both "deportation" and "return". As petitioners concede, Br. 34, the term "deport" refers to the removal of persons from within the United States. By contrast, the term "return" does not refer to – or even raise any inference about – the place from which one is returning or being returned. One can return or be returned *from anywhere* to a place or position that one formerly occupied. Accordingly, as the court of appeals observed, "the plain language of [§ 1253(h)(1)] demonstrates that what is important is the place 'to' which, not from which, the refugee is returned." Pet. App. 23a.

2. The present language is not accidental. To the contrary: Section 1253(h)(1) reflects the considered decision of Congress to jettison prior, narrowing language in favor of the present all-encompassing protections.

Prior to 1980, Section 1253(h)(1) read:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time he deems to be necessary for such reason.

In 1980, Section 1253(h)(1) was revised in three ways – each of which bears on its present application.

First, Congress expressly added the term "or return" to Section 1253(h)(1), thus expanding the categories of Executive action addressed by the provision. Congress' addition of the disjunctive "or return" following the word "deport" in Section 1253(h)(1) indicates that Congress intended to add a prohibition on some action *other* than the deportation of aliens from the United States.[2]

Second, Congress specifically jettisoned the very language petitioners would read back into the statute. In particular, Congress *struck* the phrase "within the United States," which had previously modified the scope of Section 1253(h)(1). Congress thereby eliminated the very modification of the term "any alien" on which petitioners insist. That change in the law cannot be ignored. To the contrary, as this Court recently reiterated, " a change in language [must] be read, if possible, to have some effect." *American National Red Cross* v. *S. G.*, 112 S. Ct. 2465, 2475 (1992) (citations omitted). And "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of

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[2] Petitioners contend, however, that Congress' addition of the words "or return" to Section 1253(h)(1) was intended merely to bring excludable, in addition to deportable, aliens within the statute's scope. However, Congress was fully capable of using the term "exclude" or "excludable" when it intended to limit coverage in that manner. See, *e.g.*, 8 U.S.C. § 1182 (covering "excludable aliens"). "Congress' decision to use the broader phrase * * * strongly suggests that it did not intend to restrict the provision in the manner that petitioner[s] contend[]." *Patterson* v. *Shumate*, 112 S. Ct. 2242, 2246-2247 (1992) (footnote omitted).

other language." *Cardoza-Fonseca*, 480 U.S. at 442-443 (internal quotations omitted).[3]

Third, Congress replaced the prior permissive language – providing that the Attorney General "is authorized to withhold" deportation – with the present command to do so. Taken in conjunction with the other alterations, this revision reflects Congress' evident intent to protect "any" alien – wherever he may be found.

3. In short, by expressly *abandoning* the earlier, narrowing language of Section 1253(h)(1), Congress confirmed the wide sweep of that provision. And that conclusion is confirmed by comparing Section 1253(h)(1) with other sections of Part V of the INA – each of which is limited by its terms to aliens "in" or "within" the United States. See, *e.g.*, 8 U.S.C. § 1251(a) (categories of aliens "in the United States" subject to deportation); 8 U.S.C. § 1252(b) (finality of decisions of the Attorney General where an alien "is deported from the United States"); 8 U.S.C. § 1158 (direction for Attorney General to "establish a[n asylum] procedure for an alien present in the United States or at a land border or port of entry").

Moreover, at the same time that it *excised* the "within the United States" limitation from Section 1253(h)(1), Congress also *added* the subsections of Section 1253(h)(2), each of which *contains* the limitation on which petitioners rely. These subsections provide that withholding of deportation or return is not available to an alien who poses a danger to the "community of the United States," 8 U.S.C.

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[3] As the Second Circuit found below, "[t]o accept the government's reading of the statute, * * * would, in effect be [to] read[] the words 'within the United States' back into [§ 1253(h)(1)], which would counter Congress' plainly expressed intent to eliminate those limiting words in 1980." Pet. App. 18a.

§ 1253(h)(2)(B), has committed a serious nonpolitical crime "prior to the arrival of the alien in the United States," 8 U.S.C. § 1253(h)(2)(C), or poses a threat to the "security of the United States," 8 U.S.C. § 1253(h)(2)(D). These provisions illustrate (1) that Congress knew how to limit the scope of a statutory provision to aliens within the United States, and (2) that Congress did place such a limitation on provisions that are specifically – and solely – designed to protect the domestic security of the United States. In contrast, Congress specifically *excised* this limitation from Section 1253(h)(1), which focuses not on domestic security, but on protecting persecuted aliens by preventing the return of those aliens into the hands of their persecutors.

Again, these drafting distinctions cannot be treated as mere happenstance. As this Court has held in the context of this very statutory scheme, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Cardoza-Fonseca*, 480 U.S. at 432 (citations and internal quotations omitted); accord, *Patterson* v. *Shumate* 112 S. Ct. 2242, 2246-2247 (1992); *Gozlon-Peretz* v. *United States*, 111 S. Ct. 840, 847 (1991); *General Motors* v. *United States*, 496 U.S. 530, 537-538 (1990); *Russello* v. *United States*, 464 U.S. 16, 23 (1983); *United States* v. *Naftalin*, 441 U.S. 768, 772-773 (1979). This "contrast between the language used in the two standards" (*Cardoza-Fonseca*, 480 U.S. at 432) thus confirms the court of appeals' sensible conclusion: that Congress meant what it said when it deleted the term "within the United States" from the text of Section 1253(h)(1).[4]

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[4] Petitioners contend that Section 1253(h)(1) is triggered "only 'if the Attorney General determines' that the alien would be (continued...)

4. Petitioners principally rely not on the language of Section 1253(h)(1), but on a presumption against extraterritorial application of United States statutes. No such presumption is warranted in this case.

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[4] (...continued)
threatened with persecution," and that the Attorney General maintains the discretion to refuse to make such a determination in cases of aliens on the high seas, but not in cases of aliens within the United States. Br. 30-32. Petitioners' reading of Section 1253(h)(1) is exceedingly strained, for two reasons. First, this reading relies on a distinction between aliens within the United States, who are entitled to no process, and those within the United States, who are entitled to process, that is completely absent in the statute, and that cannot be read into Section 1253(h)(1) by reference to implementing regulations. Second, Petitioners' interpretation ignores the operative verb "shall" -- added by Congress in 1980 -- which was intended to make the section legally mandatory and not discretionary. The Attorney General has the authority to make the determination *whether* the Haitians would be threatened with persecution or not upon their return to Haiti; he does not have the authority to refuse to make any determination at all, and then to return them to Haiti.

Unlike Petitioners' reading, a reading of Section 1253(h)(1) that recognizes that provision's mandatory character is completely consistent with the 1980 revisions to Section 1253(h)(1). In 1980, Congress sought to conform the protections due refugees under Section 1253(h)(1) to the dictates of Article 33.1 of the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, 176 (1954), which, as this Court has noted, creates "an *entitlement* for the subcategory [of refugees] that 'would be threatened' with persecution upon their return." *Cardoza-Fonseca*, 480 U.S. at 441 (emphasis added). A reading of Section 1253(h)(1) that permits the Attorney General to avoid completely the issue of refugee status entirely flies directly in the face of Congress' intent to broaden, rather than narrow, the protections provided in Section 1253(h)(1), in accordance with Article 33.1.

As the court of appeals recognized, the presumption against extraterritorial application of U.S. laws "is a canon of construction 'whereby *unexpressed* congressional intent may be ascertained', *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949)(emphasis added), which 'serves to protect against unintended clashes between our laws and those of another nation which could result in international discord.' *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991) [*"ARAMCO"*]." Pet. App 17a. Accord, *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 14, 21-22 (1963)). Thus, the presumption applies if, but only if, each of two factors is present: (1) there is an ambiguity in the statute making it unclear whether Congress intended the statute to have extraterritorial application; and (2) there is a threat that extraterritorial application of the statute would infringe on the jurisdiction of another nation.

Here, Congress expressly addressed the question of extraterritorial application by amending the statutes to remove the geographical limitation "within the United States." When Congress's attention has been drawn to a question, and the language of the statute has been crafted in response to the issue, the only issue left is: what did Congress mean? There is no role left for general presumptions to play.

Moreover, with respect to the first factor, Congress need not specifically invoke extraterritoriality to make its will known. The nature of the statute at issue and the circumstances surrounding its enactment may reveal congressional intent as clearly as would express language indicating extraterritorial effect. Here, it is evident from the context and subject matter that Congress understood this statute to have extraterritorial application. Indeed, only an extraterritorial reading of Section 1253(h) is consistent with the international nature of the subject matter and the structure

of the INA.[5] To presume that the INA does *not* apply outside the boundaries of the United States in the absence of express language to that effect would make administration of the INA -- including the Executive actions in this very case -- impossible.

This case began when executive officials apprehended citizens of Haiti on the high seas -- itself an extraterritorial application of United States law. This action was authorized by Executive Order No. 12324 (Sept. 19, 1981), which in turn invoked the authority of *inter alia*, Section 212(f) of the INA, 8 U.S.C. § 1182(f). Yet ironically, this Section of the INA contains no language expressly indicating that it has extraterritorial application. Like Section 1253(h), Section 212(f) refers simply to "any aliens or . . . any class of aliens," making no mention of geographical location. It is hard to see why Section 212(f)'s reference to "any alien" would apply to aliens on the high seas, if the reference in Section 1253(h)(1) to "any alien" does not. Only by a selective application of the presumption can the Executive assert the extraterritorial authority to apprehend aliens on the

[5] Conversely, this Court has generally construed quintessentially domestic legislation to apply only within the United States, especially where the party urging extraterritorial application of the statute has pointed to no more than boilerplate jurisdictional provisions in support of extraterritorial application. *New York Central R. Co. v. Chisholm*, 268 U.S. 29, 31-32 (1929)(Federal Employers Liability Act does not apply extraterritorially); *ARAMCO*, 112 S.Ct. at 1232 (Title VII of the Civil Rights Act does not apply extraterritorially); *McCulloch*, 372 U.S. at 21 (National Labor Relations Act does not apply extraterritorially); *Foley Bros.*, 336 U.S. at 285 (Eight Hour Law does not apply extraterritorially).

high seas, but deny them extraterritorial application of the privilege against forcible return.[6]

Similarly, petitioner contends that the proper procedure for a Haitian refugee wishing to enter the United States is to apply for asylum in Haiti, pursuant to Section 207 of the INA. But Section 207, which refers to "any refugee who is not firmly settled in any foreign country (8 U.S.C. § 1157(c)(1)), does not contain any express extraterritorial language,[7] any more than does Section 1253(h). If the presumption against extraterritoriality applies to one statute, it should apply equally to the other. The government should not be allowed to turn the presumption on and off like an appliance.

In short, the subject matter of these related sections of the INA is inherently international. The Executive properly enforces the INA outside the boundaries of the United States when that is its evident meaning -- as in the instances of interdiction and asylum applications -- even when there is no clear language suggesting extraterritorial application. By the

[6] Executive Order 12324 also cites as authority Section 215(a)(1) of the INA, 8 U.S.C. § 1185(a)(1), which makes it unlawful "for any alien to depart from or enter or attempt to depart from or enter the United States" except pursuant to regulation. While this obviously applies to aliens at the borders of the United States, it does not self-evidently give the Executive authority to range about the world interdicting and returning refugees. Again, a strong presumption of extraterritoriality is inconsistent with executive practice.

[7] Such a person could be physically present anywhere in the world, inside or outside the United States. The qualification that he may not be "firmly settled in any foreign country" has nothing to do with his location at the time he applies for asylum under Section 207.

same token, Congress typically specifies geographical limitations where they are relevant. The presumption against extraterritorial application, which is wholly appropriate for domestic legislation, cannot be applied to this statute without doing violence to its accepted meaning in other contexts.

Thus, because Congress clearly intended Section 1253(h)(1) to apply extraterritorially, the first predicate for invoking the presumption against extraterritoriality is unavailable. The second predicate for invoking the presumption is also unavailable, given that application of United States law in this case does not threaten the jurisdiction of other nations.

There is every reason to doubt that the presumption against extraterritorial application applies to conduct taking place on the high seas. The roots of the presumption lie in the field of conflicts of law. In *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909), the case in which the presumption first formally appeared, Justice Holmes explained the doctrine in terms of the traditional conflicts principle "that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." *Id.* Courts presume that United States statutes apply only within the United States because such a presumption avoids the friction with sister states that comes from the attempt by each of two sovereigns to apply its own law to the same situation simultaneously . This concern does not arise in cases on the high seas, where no sovereign's law applies. *United States* v. *Wright-Barker*, 784 F.2d 161, 166 (3d Cir. 1986); *United States* v. *Romero-Galue*, 757 F.2d 1147, 1149 n.1 (11th Cir. 1985)[8]. Where there can be no

[8] This principle is incorporated into the Convention on the High Seas, 13 U.S.T. 2312, T.I.A.5. No. 5200 (entered into force Sept. 30, 1962), to which the United States is a signatory.

conflict of law there is no need for a presumption to avoid one.

In *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), this Court invoked the presumption against extraterritorial application in a tort case arising "on the high seas some 5,000 miles off the nearest shores of the United States." *Id.* at 440. In that case, however, the relevant statutory provision expressly limited coverage to damage "occurring in the United States" (28 U.S.C. § 1605(a)(5), quoted at *id.* at 439). The presumption was thus used merely to reenforce the plain language of the statute. This is the converse case. If the Court held in *Argentine Republic* that the language "in the United States" meant that damage on the high seas was not within the reach of the statute, it follows that in this case, Congress's removal of the language "within the United States" would mean that the statute encompasses the high seas.

For all of these reasons, the presumption against extraterritorial application of United States law has no bearing on the analysis of Section 1253(h)(1). Petitioners may therefore not avoid the plain language of the statute.

5. Finally, Article 33.1 of the United Nations Convention Relating to the Status of Refugees, on which § 1253(h)(1) was modeled, see *Cardoza-Fonseca*, 480 U.S. at 429, confirms the lesson of the text: Section 1253(h)(1) applies to aliens both within and without the United States. Article 33.1 provides:

> No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

189 U.N.T.S. 150, 176 (1954).

In construing a treaty, this Court looks first to the governing language. *United States* v. *Alvarez-Machain*, 112 S. Ct. 2188, 2193 (1992); *Air France* v. *Saks*, 470 U.S. 392, 397 (1985). That principle of treaty construction is also codified in Article 31 of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) (*entered into force* Jan. 27, 1980), to which the United States is a signatory. As with statutes, treaties are to be construed with reference to their terms' "ordinary meaning * * * in their context," and "in light of their object and purpose." *Ibid.*

Article 33.1 contains no express restrictions on the places in which the Contracting States' obligations attach. Moreover, Article 33.1 expressly distinguishes *expelling* and *returning* a refugee. To ascribe to the term "return ('*refouler*')" the meaning, suggested by petitioners, of removing only aliens within a Contracting State's territory, would make the term redundant. As petitioners admit, the term "expel" in Article 33.1 "refer[s] to the formal process for removing an alien who was admitted to the country[; return, or r]efoulement, by contrast connotes 'summary reconduction' (mere physical relocation) of an individual." Br. 39 (citations omitted). Accordingly, Article 33.1 essentially reads: "No contracting State shall expel or return (physically relocate) a refugee in any manner whatsoever to the frontiers of territories" where he faces persecution. Thus, just as with the term "return" in Section 1253(h)(1), what is important under Article 33.1 is the place *to* which the refugee is to be returned, not the place *from* which he is returning.

The text and structure of the Refugee Convention as a whole lend further support to this reading. First, under the Protocol, a "refugee" is "any person who * * * owing to a well-founded fear of being persecuted * * * is outside the

country of his nationality." Consequently, a "refugee" under this Protocol, like "any alien" under Section 1253(h)(1), is defined not with regard to his current location but with regard to his past location (to which he is threatened with return in the future).

Second, other articles of the Refugee Convention use language which carry a more limiting effect on the term "refugee." See, *e.g.*, Article 4 ("refugees within their territories"); Articles 15, 17.1, 19.1, 21, 23, 24.1, 28 ("refugees lawfully staying in their territory"); Articles 18, 26, 32.1 ("refugee lawfully in its/their territory"); Article 27 ("refugee in their territory"). Indeed, paragraph 2 of Article 33 states that the benefit of this article may not be claimed by any refugee who is a danger to the security of "the country in which he is." 189 U.N.T.S. at 176. As in the INA, these articles, and paragraph 2 of Article 33 in particular, show that the drafters (1) knew how to limit an article's application to refugees within the territory of a Contracting States, and (2) included that limitation in those articles that focus on the need for removal or retention of a refugee within a Contracting State's territory in order to protect the interests of that State. Article 33.1, like Section 1253(h)(1), by contrast, contains no such limitation because it focuses on protecting the refugee by preventing the return, "in any manner whatsoever," of such refugee into the hands of his persecutors.[9]

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[9] Moreover, Article 40.1 of the Refugee Convention, which provides that a State may "declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible" does not, as petitioners contend, Br. 36-37, indicate that the scope of Article 33.1 is limited to the Contracting State's metropolitan territory. Article 40.1 simply allows each state to bind its territorial possessions to the same

(continued...)

In short, Article 33.1 unambiguously prohibits Contracting States from "returning a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened" because of his political opinion, regardless of the refugee's present location. By incorporating the language of this article, Section 1253(h)(1) accomplishes the same purpose: it strictly limits the Attorney General's discretion in the return of aliens and forbids their return into the hands of those who would persecute them. Executive Order No. 12,807 violates the plain language of the INA by granting the Attorney General "unreviewable discretion" in the return of aliens and authorizing Executive officials to return Haitian refugees forcibly and summarily into the hands of their persecutors.

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[9] (...continued)
obligations that the State itself had assumed under the Refugee Convention. It does not restrict the scope of the these obligations to the geographical limits of these territories, or to the geographical limits of the Contracting State itself.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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United States

OCTOBER TERM, 1992

GENE MCNARY, COMMISSIONER, IMMIGRATION and NATURALIZATION SERVICE, et al,
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VS.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* MEMBERS OF CONGRESS URGING AFFIRMANCE

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IDENTIFICATION OF *AMICI CURIAE*

This *amici curiae* brief is filed on behalf of Senator EDWARD M. KENNEDY and former Representative ELIZABETH HOLTZMAN, lead sponsors and floor managers of the legislation that became the Refugee Act of 1980, as well as the following Members of Congress: CHESTER G. ATKINS, HOWARD L. BERMAN, BENJAMIN L. CARDIN, JOHN CONYERS, JR., RONALD V. DELLUMS, BARNEY FRANK, SAM GEJDENSON, JOSEPH P. KENNEDY, II, MICHAEL J. KOPETSKI, JOHN LEWIS, KWEISE MFUME, JOHN JOSEPH MOAKLEY, JAMES L. OBERSTAR, MAJOR R. OWENS, NANCY PELOSI, CHARLES B. RANGEL, PAUL SIMON, LOUISE McINTOSH SLAUGHTER, EDOLPHUS TOWNS, JOLENE UNSOELD, and CRAIG A. WASHINGTON.

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No. 92-344

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VS.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* MEMBERS OF CONGRESS URGING AFFIRMANCE

INTEREST OF *AMICI CURIAE*

Amici curiae, identified on the inside front cover of this brief, are 22 Members of Congress and one former Member of the House of Representatives who are concerned with the proper interpretation of the immigration laws. *Amici* include Senator Edward M. Kennedy and former Representative Elizabeth Holtzman, who were lead sponsors and floor managers of the legislation that became the Refugee Act of 1980, in their positions as, respectively, Chairman of the United States Senate Committee on the Judiciary and Chairwoman of the United States House of Representatives Committee on the Judiciary Subcommittee on Immigration, Refugees, and International Law. *Amici* have two vital concerns in this case: (1) ensuring respect for the balance of authority over immigration policy between the legislative and

executive branches that was established by the Refugee Act of 1980; and (2) guaranteeing that persons are not forcibly returned to Haiti who have not had a full and fair determination of their entitlement to the Refugee Act's protections against return to a country of persecution.

INTRODUCTION

On May 24, 1992, President Bush targeted Haitian nationals with an Executive Order ("Executive Order" or "Order") directing the forcible return of all aliens captured on the high seas. President Bush issued the Order despite the executive's own acknowledgement that Haiti's citizens suffer from one of the most brutal examples of government persecution anywhere in the world.[1] With this program of forced return directly to the country of feared persecution, the Defendant-Petitioners have violated the government's most fundamental duty under both domestic and international refugee law: not to repatriate persons in flight from persecution without a procedure to determine the merits of their claims.

By affirmatively intercepting Haitians fleeing their government and returning them to Haiti where the district court found they "face political persecution and even death,"[2] the Defendant-

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[1]For example, the executive recently reported to Congress on the status of human rights in Haiti:

> Following the coup . . ., the [Haitian] army resorted to brutality and massacre to control the population. . . . [T]he army employed violence on several occasions to intimidate opposition political supporters, popular organizations, the urban poor, and the media, and otherwise to discourage antiregime activity. . . . Hundreds were killed in political violence during 1991.

U.S. Dep't of State, *Country Reports on Human Rights Practices for 1991*, 102d Cong., 1st Sess. 633-34 (Joint Comm. Print 1992); *see also* Americas Watch, *et al.*, *Return to the Darkest Days: Human Rights in Haiti Since the Coup* (Dec. 30, 1991).

[2]*Haitian Centers Council, Inc. v. McNary*, No. 92-CV-1258, slip op. at 11 (E.D.N.Y. Apr. 6, 1992), *rev'd*, 969 F.2d 1350 (2d Cir.), *stay granted*, ___ U.S. ___, 113 S. Ct. 3, *cert. granted*, ___ U.S. ___, 113 S. Ct. 52 (1992).

Petitioners violate congressional will and the express terms of the Refugee Act of 1980 (the "Refugee Act" or the "Act"). The Act mandates protection and procedures under sections 243(h) and 208(a) for evaluating fairly the claims of persecution of those in flight who seek U.S. territorial protection. Section 243(h) embodies the fundamental prohibition of international law not to return refugees to countries in which they fear persecution. The Government's construction of Congress' 1980 amendment of section 243(h) is wholly unsupported by the legislative history.

The creation of a refugee process in Haiti following the issuance of the Executive Order does not affect the separate and distinct requirements to extend these protections to those who have fled their persecutors. The Government's contention that Haitians' claims may be processed only overseas under section 207, and that they may be denied the other refugee protections provided by the Act, contravenes the language and structure of the Act. The Act provides a comprehensive not alternative scheme of protection remedies. The Government's contention to the contrary defies common sense and is without precedent in years of executive application of the Refugee Act. Further, one of Congress' purposes in the Refugee Act was to end discriminatory treatment of refugee groups.

SUMMARY OF ARGUMENT

The Executive Order violates two fundamental principles of the Refugee Act. First, it violates the Act's reaffirmation of the U.S.'s obligations as a signatory of the United Nations Convention Relating to the Status of Refugees ("U.N. Convention"). With the Refugee Act, Congress expressly sought to reaffirm these obligations and enacted the U.N. Convention's neutral, nondiscriminatory definition of "refugee." In addition, it expressly reaffirmed one of the core tenets of the U.N. Convention: Article 33's principle of *non-refoulement* prohibiting any signatory government from returning refugees to the frontiers of persecuting countries.

Second, the Order violates Congress' intent, evident in the Act's language and structure, to create a comprehensive scheme

for refugees fleeing persecution. The Act establishes three distinct and concurrent avenues of protection. It provides, *inter alia*: (1) a revamped overseas processing procedure under section 207 with the neutral U.N. Convention definition of "refugee" as well as an expanded protection for those unable to flee their home countries; (2) a statutory right to apply for asylum under section 208(a) at or within U.S. borders; and (3) mandatory withholding of deportation or return under section 243(h) which reaffirms the U.S.'s obligations under Article 33 of the U.N. Convention. Congress designed this comprehensive system to ensure access to protection on a fair and uniform basis regardless of the refugees' country of origin or location.

The effect of the Executive Order is to return U.S. policy to the pre-Act era when the executive had virtually unlimited discretion over which groups were granted refugee protection in the United States. One of Congress's motivations in passing the Refugee Act was to constrain executive discretion. Congress' purpose in adopting the new definition and international standards was to ensure the extension of protection opportunities to those groups which had been excluded under the prior law's discretionary scheme of *ad hoc* overseas programs, administrative asylum and withholding of deportation.

The Government's two primary arguments in defense of the Order are without merit. First, the Government contends that the Refugee Act's amendment of section 243(h)'s withholding provision was only intended to address a particular set of circumstances which arose in a 1958 Supreme Court decision. The Government contends that Congress amended this provision only to vitiate the holding in *Leng May Ma v. Barber*, 357 U.S. 185 (1958), by extending withholding of deportation benefits to aliens in exclusion proceedings. Neither the language nor the legislative history supports this contention. Moreover, even if this contention is true, the Haitians interdicted by the government while fleeing Haiti share the custodial status of the plaintiff in *Leng May Ma*. Therefore, under the Government's own reasoning, the Haitians before this Court are entitled to withholding procedures under section 243(h).

Second, the Government contends that it may forcibly return refugees to the site of persecution and that overseas refugee processing can constitute an exclusive avenue of protection. As noted, forced return violates the express provision of Article 33 of the U.N. Convention and section 243(h) of the Act. Moreover, the language, structure and legislative history of the Act, as well as years of executive application of the Act, demonstrate that Congress intended that the Act's three separate but concurrent forms of refugee protection comprise a comprehensive scheme. For all these reasons, *amici* believe that the Refugee Act and the international obligations it embodies require that this Court affirm the decision of the United States Court of Appeals for the Second Circuit enjoining the Executive Order.

ARGUMENT

The Executive Order of May 24, 1992,[3] contravenes Congress' intent as demonstrated by the language, structure, and legislative history of the Refugee Act of 1980.[4] Heralded as "one of the most important pieces of humanitarian legislation ever enacted by a U.S. Congress,"[5] the Refugee Act was the first legislation to establish a clear and comprehensive U.S. commitment to the protection of refugees.[6] The ideal of refugee protection embodied in the Act affirmed a historic and even sacred aspect of the U.S. national identity and heritage.[7] Congress expressed the purpose of

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[3]Exec. Order No. 12,607, 57 Fed. Reg. 23,133 (1992).

[4]Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.). The Refugee Act amended the Immigration and Nationality (McCarran-Walter) Act of 1952, 8 U.S.C. §§ 1101, *et seq.* (1970 & West Supp. 1992) ("I.N.A.").

[5]126 Cong. Rec. 4501 (1980) (remarks of Rep. Rodino).

[6]*See generally* Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 11-12 (Dec. 1981).

[7]"It reflects one of the oldest themes in American history — welcoming homeless refugees to our shores. It gives statutory meaning to our national commitment to human rights and humanitarian concerns. . . ."

the Act in terms of "the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homeland,"[8] and to establish a "national policy of welcome to refugees."[9] Congress also sought to reaffirm existing U.S. obligations under international law.

I. THE EXECUTIVE ORDER VIOLATES CONGRESS' INTENT THAT THE REFUGEE ACT OF 1980 REAFFIRM U.S. OBLIGATIONS UNDER INTERNATIONAL REFUGEE LAW.

Congress expressly intended the Refugee Act to overhaul the respective roles of the executive and the legislative branches in refugee and asylum decisions.[10] Specifically, Congress sought to end the previous *ad hoc* and discriminatory refugee policy domi-

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S. Rep. No. 256, 96th Cong., 2d Sess. 1 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141. *See also* comments of State Department witness James Carlin during earlier hearings: "we should remember that the United States is a land of immigrants, and since the founding of the Republic we have had a special national heritage of concern for the uprooted and persecuted." *Admission of Refugees into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 16 (1977) (*"Hearings on H.R. 3056"*).

[8] *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 4-5 (1979) (*"Hearings on H.R. 2816"*).

[9] S. Rep. No. 256, *supra*, at 3.

[10] In enacting this sweeping legislation, Congress acted pursuant to its plenary power in the area of immigration. Article I, Section 8, Clause 4 of the U.S. Constitution empowers Congress to "establish an uniform Rule of Naturalization," thereby bestowing on Congress power in this field. As the Supreme Court stated in 1909, "[O]ver no conceivable subject is the legislative power of Congress more complete. . . ." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (*quoting Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

nated by the executive's foreign policy concerns.[11] Congress replaced it with a uniform, statutory regime in conformance with the universal and ideologically neutral standards of the U.N. Convention.[12] As the Supreme Court stated in 1987, "[i]f one thing is clear from . . . the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol. . . ."[13]

The cornerstone of the U.N. Convention is the Article 33 mandatory prohibition against return or *"refoulement"*:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on

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[11] Senator Kennedy, one of the Refugee Act's primary sponsors, expressed this concern at one of the first hearings on the legislation:

> For too long our policy toward refugee assistance has been *ad hoc*, with refugees being admitted in fits and starts, and after long delays and great human suffering, because our existing immigration law is inadequate, discriminatory, and totally out of touch with today's needs.

The Refugee Act of 1979: Hearing on S. 643 Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 1 (1979) (opening statement of Sen. Kennedy).

[12] *See* United Nations Convention Relating to the Status of Refugees, open for signature July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 137 ("U.N. Convention"). The U.N. Convention was incorporated into U.S. law by the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force with respect to the United States on Nov. 1, 1968) ("U.N. Protocol"). The terms "U.N. Convention" and "U.N. Protocol" are often used interchangeably.

[13] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) (citations omitted). *See also Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 551-52 (9th Cir. 1990); *Doherty v. United States Dep't of Justice, INS*, 908 F.2d 1108, 1119 (2d Cir. 1990), *rev'd on other grounds sub. nom. INS v. Doherty*, ____ U.S. ____, 112 S. Ct. 719 (1992); *Yiu Sing Chun v. Sava*, 708 F.2d 869, 872 (2d Cir. 1983); *Stevic v. Sava*, 678 F.2d 401, 408 (2d Cir. 1982), *rev'd sub nom. INS v. Stevic*, 467 U.S. 407 (1984).

account of his race, religion, nationality, membership of a particular social group or political opinion.

U.N. Convention, art. 33, para. 1. By ratifying the treaty, the United States obligated itself to comply with Article 33's mandate not to return a refugee to the borders of a persecuting country by exercising its pre-existing discretion under section 243(h) in a non-discriminatory manner.[14] With the Refugee Act, Congress amended section 243(h) of the I.N.A. expressly to reaffirm this obligation of the United States under international law. *See* section IIA, *infra*.

The U.N. Convention defines "refugee" in strictly non-ideological terms and prohibits signatory states from implementing refugee programs on the basis of the applicant's politics or country of origin.[15] The Refugee Act adopted a new definition of "refugee" in conformance with the U.N. Convention's definition.[16] In so doing, Congress ended the prior discretionary scheme under which the executive determined refugee admissions on an

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[14]*See INS v. Stevic*, 467 U.S. 407 (1984)(court concluded that the Attorney General could and should use his discretionary powers under the I.N.A. to comply with Article 33 of the U.N. Convention).

[15]Article 1 defines the term "refugee" as "any person who:"

> . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. . . .

U.N. Convention, art. 1, para. A(2); *see also id.*, art. 3 (mandating that each contracting state apply the provisions of the U.N. Convention "without discrimination as to race, religion or country of origin").

[16]Congress repeatedly stressed this important change achieved by the Act. Senator Kennedy introduced the legislation in the Senate with the following description:

> The new definition makes our law conform to the United Nations Convention and Protocol Relating to the Status of Refugees, and provides as well for "displaced persons" within their own country.

126 Cong. Rec. 3757 (1980)(remarks of Sen. Kennedy). Representative Holtzman employed a similar description when introducing it in the House:

ad hoc and often discriminatory basis. Instead, the Act instituted a definition of "refugee" that is internationally recognized and amenable to legal interpretation.[17]

The Executive Order violates the explicit language and intent of Congress under section 243(h) and Article 33 which prohibit the executive from returning refugees directly to countries of persecution. The Order singles out one group by designing a program aimed exclusively at Haitian nationals, whereas Congress intended to create access to protection on a fair, neutral and non-discriminatory basis.

II. THE EXECUTIVE ORDER VIOLATES CONGRESS' INTENT THAT THE ACT'S THREE AVENUES OF REFUGEE PROTECTION COMPRISE A COMPREHENSIVE SCHEME OF PROTECTION THAT WOULD ENSURE ACCESS BY ALL PERSONS REGARDLESS OF THEIR LOCATION.

The Government contends that the Order legally denies Haitians withholding procedures because, after instituting its program

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> First, the bill provides a new definition of the term "refugee" which essentially conforms to that used under the United Nations Convention and Protocol Relating to the Status of Refugees, and which eliminates geographical and ideological restrictions now applicable. . . .

125 Cong. Rec. 35,814 (1979); *see also*, S. Rep. No. 256, *supra* at 4, 15; H.R. Conf. Rep. No. 781, 96th Cong., 2d Sess. 19 (1980); 125 Cong. Rec. 23,232 (1979)(remarks of Sen. Kennedy); 126 Cong. Rec. 4499 (1980)(remarks of Rep. Holtzman) ("[t]his new definition finally eliminates the geographical and ideological restrictions applicable to refugees contained in our law since 1952"); 125 Cong. Rec. 4798 (1979) (remarks of Rep. Rodino).

[17]"A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. . . . He does not become a refugee because of recognition, but is recognized because he is a refugee." Office of the United Nations High Commissioner for Refugees' ("UNHCR"), *Handbook on Procedures and Criteria for Determining Refugee Status*, ¶ 28 (Geneva 1979). The UNHCR Handbook provides significant guidance to the meaning of the Protocol and, by implication, to the Refugee Act. *See Cardoza-Fonseca*, 480 U.S. at 439 n.22; *Matter of Frentescu*, 18 I. & N. Dec. 244 (BIA 1982).

of forced repatriation, it established a process for Haitians to apply for refugee status under section 207 at the U.S. Embassy in Port-au-Prince, Haiti. This policy violates congressional intent as embodied in the language and structure of the Act. With the Refugee Act, Congress sought to "establish a coherent and comprehensive U.S. refugee policy."[18] This objective found its expression in the reaffirmation of international obligations and in the creation of three distinct statutory protections: section 243(h), section 208(a), and section 207. For those who flee and seek U.S. territorial protection, the Act created a new protection remedy in section 208(a) and reformulated section 243(h) into a mandatory provision. Section 207 rationalized procedures in what had long been an *ad hoc* and chaotic aspect of U.S. immigration policy, that of providing admissions programs for refugees abroad.[19] In creating two separate avenues of relief, Congress institutionalized the historically different roles of refugee resettlement and territorial asylum.[20]

The comprehensive nature of this tripartite scheme was intended to ensure that all fleeing refugees have access to protection regardless of whether they are within the United States, arriving at the border, trapped inside their home countries, in a third country of temporary asylum, or en route from their home country to the United States. The government's conduct in forcing Haitians back to Haiti and funnelling them through section 207 overseas refugee processing violates the purpose of the Act to make these protections comprehensive and to reaffirm the principle of *non-refoulement*.

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[18]H.R. Rep. No. 608, 96th Cong., 1st Sess. 1 (1979).

[19]*See* Deborah E. Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 Va. J. Int'l L. 1, 1 n.2 (1987).

[20]"One serves the larger requirements of U.S. policy; the other responds to the immediate needs of individuals." *Id.* at 40.

A. The Legislative History of the Refugee Act Confirms Section 243(h)'s Broad Prohibition Against the Return of any Aliens to a Country of Persecution.

Congress amended section 243(h)'s withholding of deportation provision expressly to reaffirm the U.S.'s international law obligations under Article 33 of the U.N. Convention. Indeed, Congress emphasized this purpose at each step in the legislative history of this provision:

> The Conference substitute adopts the House provision with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol.

H.R. Conf. Rep. No. 781, *supra*, at 20.[21] The statements of the Act's sponsors in describing the Act reaffirm that the amendment of section 243(h) was designed to make U.S. statutory obligations "consistent with the relevant provisions of the United Nations

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[21]The House report on its bill, H.R. 2816, upon which the Government places so much reliance, *see* Brief of the Petitioners at 53, also stresses this construction of the amendment:

> (2) *Withholding of Deportation.* — Related to Article 33 is the implementation of section 243(h) of the Immigration and Nationality Act. That section currently authorizes the Attorney General to withhold the deportation of any alien in the United States to any country where, in his opinion, the alien would be subject to persecution on account of race, religion, or political opinion.
>
> Although this section has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the Committee feels it is desirable, for the sake of clarity, to conform the language of that section to the Convention. This legislation does so by prohibiting, with certain exceptions, the deportation of an alien to any country if the Attorney General determines that the alien's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. The exceptions are those provided in the Convention. . . .
>
> As with the asylum provision, the Committee feels that the proposed change in section 243(h) is necessary so that U.S. statutory law clearly reflects our legal obligations under international agreements.

H.R. Rep. No. 608, *supra*, at 18.

Convention and Protocol." 126 Cong. Rec. 3757 (1980) (statement of Sen. Kennedy).[22]

Congress achieved this purpose by ensuring that the language of section 243(h) was consistent with its pre-existing treaty obligations forbidding the "return" of refugees as well as their "deportation," and eliminating the requirement that the alien be "within the United States" to qualify for this protection.[23] By amending section 243(h), Congress intended to reaffirm the

[22]Senator Kennedy described this provision of the final bill as follows:

> Also, relative to the suspension of deportation, under Section 243(h) of the Immigration and Nationality Act, it is the intention of the Conferees that the new provisions of this Act shall be implemented consistent with the relevant provisions of the United Nations Convention and Protocol.

126 Cong. Rec. 3757 (1980) (statement of Sen. Kennedy). Representative Holtzman described it in similar terms:

> Finally, the conference report also adopts the House provisions relating to asylum and withholding of deportation. These provisions are consistent with our international obligations under the United Nations Convention and Protocol, and the conferees intend that the new sections be implemented consistent with those international documents.

126 Cong. Rec. 4500 (1980) (remarks of Rep. Holtzman). When introducing the legislation, she described it as follows:

> In addition, the bill amends section 243(h) of the Immigration and Nationality Act, relating to withholding of deportation, to prohibit, with certain exceptions, the deportation of an alien to any country if the Attorney General determines that the alien's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion.
>
> These provisions are consistent with our international obligations, and were supported by the State and Justice Departments in addition to the United Nations High Commissioner for Refugees and numerous other witnesses.

125 Cong. Rec. 35,814-15 (1979) (remarks of Rep. Holtzman).

[23]Former section 243(A) of the I.N.A. read as follows:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

8 U.S.C. § 1253(h) (1970) (amended 1980). The Refugee Act amended this section to read:

> The Attorney General *shall not* deport *or return* any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1253(h)(1) (West Supp. 1992) (emphasis added).

U.S.'s obligations not to return persons — wherever found — to countries of persecution.

Congress did not intend that the protection of section 243(h) be limited to those inside the United States or at its borders. In contrast, Congress tailored the asylum protection of section 208(a) and the overseas admissions process of section 207 to meet the protection needs of persons who are present in particular locations. Section 208(a) requires the Attorney General to establish a procedure for an alien "physically present in the United States, or at a land border or entry port," and section 207 provides protection to those in their home countries or third countries. Congress was thus aware that it could have similarly limited section 243(h), yet chose not to do so.

To the contrary, when Congress amended section 243(h) in 1980, it removed the phrase "within the United States" without substituting any other geographical limitation. The statute on its face does not limit eligibility to aliens who are within the U.S. territorial waters or at the U.S. border. Rather, the revision of section 243(h) plainly indicates that the statute applies to any alien, including those such as the Haitians who are attempting but have not yet achieved entry into U.S. territory.

Moreover, the amended section 243(h) prohibits "deportation or return." If "deport" connotes removal of an alien *from* the United States, *see* Brief for the Petitioners at 34 n.21, application of fundamental statutory construction principles mandates that the word "return" *not* be limited to returning persons from the United States. A basic premise of statutory construction is that a

statute is to be interpreted so that no words shall be discarded as meaningless, redundant, or mere surplusage. *See United States v. Canals-Jimenez*, 943 F.2d 1284, 1287 (11th Cir. 1991); *see also Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 970-71 (5th Cir. 1981); *Meltzer v. Board of Pub. Instruction*, 548 F.2d 559, 578 (5th Cir. 1977), *aff'd in part, rev'd in part*, 577 F.2d 311 (5th Cir. 1978)(*en banc*), *cert. denied*, 439 U.S. 1089 (1979).

An interpretation of the word "return" that is more consonant with its ordinary meaning is that it refers to a country's custodial power over a person. A country can only "return" someone over whom it has power, and it certainly can have such power over someone who is not within its borders. The U.S. government exercises custodial power over the Haitian plaintiffs when it intercepts them on the high seas. The government thus "returns" Haitian refugees to the "frontiers" of a territory where the refugees' lives or freedom are threatened in direct contravention of section 243(h) as amended.[24]

B. Section 208 Provides Uniform, Statutory Standards and Procedures for those Applying for Asylum from Within the United States.

In addition to amending section 243(h) to reaffirm U.S. treaty obligations, Congress overhauled the procedures by which persons who qualified as refugees could apply for asylum at the border of, or within, the United States. The Act sought to ensure that remedies were available not only for overseas refugees temporarily residing in third countries or those trapped in their countries of origin, but also for those who fled their countries of origin and sought U.S. territorial protections.

As the Supreme Court recognized in *Cardoza-Fonseca*, the creation of statutory asylum under section 208(a) was a major innovation of the Refugee Act. *See Cardoza-Fonseca*, 480 U.S. at 436-44. Congress was particularly concerned with ensuring uni-

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[24]These arguments about the plain language of section 243(h) are more fully treated in Plaintiff-Respondents' brief.

form and equitable access to protection.[25] Congress sought to enact a policy "which will treat *all* refugees fairly"[26] and ensure that *all* asylum applicants would have "an opportunity to have their claims considered. . . ."[27] Section 208(a) of the Act directs the Attorney General to create "a new uniform asylum procedure" to govern administrative grants of asylum.[28] The fair and uniform application of the statutory asylum procedures would be undermined completely if the President could interdict offshore certain disfavored groups and thereby deprive them of the opportunity to apply for protection.

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[25]Although discretionary, section 208(a) is unique in the intent of the statutory language to assure universal access. The statute *directs* the Attorney General to create asylum procedures available to all aliens "physically present in the United States" or applying at the border, "irrespective" of their status. No other provision of the I.N.A. so clearly emphasizes uniformity of application and accessibility, nor so clearly *de-emphasizes* an alien's status. Anker, *Discretionary Asylum, supra*, at 25-29. The importance of universal accessibility and the availability of asylum procedures has been repeatedly emphasized by both courts and commentators. *See, e.g., Jean v. Nelson*, 727 F.2d 957, 981-83 (11th Cir. 1984), *aff'd* (as to remand order only), 472 U.S. 846 (1985); *Augustin v. Sava*, 735 F.2d 32, 37-38 (2d Cir. 1984); *Duran v. INS*, 756 F.2d 1338, 1340-41 (9th Cir. 1985); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1037 n.30 and 1039 (5th Cir. 1982); *Nunez v. Boldin*, 537 F. Supp. 578, 583-87 (S.D. Tex.), *appeal dismissed*, 692 F.2d 755 (5th Cir. 1982) (all affirming Congress's intent to assure a right to apply for asylum); *see also* Anker, *Discretionary Asylum, supra*, at 27 n.140; Note, *The Right to Appointed Counsel in Asylum Proceedings* 85 Colum. L. Rev. 1157, 1168 (1985).

[26]S. Rep. No. 256, *supra*, at 2 (emphasis added).

[27]*Id.* at 9; *see also* 125 Cong. Rec. 23,233 (1979)(remarks of Sen. Kennedy).

[28]I.N.A. § 208(a), 8 U.S.C. § 1158(a) (West Supp. 1992); *see also* S. Conf. Rep. No. 590, 96th Cong., 2d Sess. 20 (1980); H.R. Rep. No. 608, *supra*, at 18 (section 208 "requir[ed] the Attorney General to establish [an asylum] procedure" that was "fair and workable"); H.R. Conf. Rep. No. 781, *supra*, at 20; *Yiu Sing Chun*, 708 F.2d at 872 (*quoting* H.R. Conf. Rep. No. 781, *supra*).

C. Section 207 Provides Systematic Procedures for the Admission of Refugees from Abroad Who Are Deemed to Be "Of Special Humanitarian Concern."

Congress also rationalized the third avenue of refugee protection, that of overseas refugee processing. Congress ended the chaotic and restrictive practice of group-based parole and replaced it with systematic procedures for the admission of refugees from abroad who Congress and the executive deem to be "of grave humanitarian concern" to the United States.[29] To establish a comprehensive regime that would include the opportunity for protection for *all* people in *all* circumstances who are in need, Congress adopted a definition of "refugee" that extended protection beyond what was required by the U.N. Convention. That treaty defined "refugee" to include only those persons who have left their home countries. *See* n. 15, *supra*. The Refugee Act, however, expanded this definition in its overseas admission program to include those in special circumstances, such as political

[29]I.N.A. § 207(d)-(e), 8 U.S.C. § 1157(d)-(e) (West Supp. 1992). Under the overseas refugee process, Congress and the executive consult on an annual basis to determine which groups of refugees are of "special humanitarian concern" and designated for admission to the United States. Both the numbers and the group designations are determined during the annual consultative process.

Congress emphasized that in selecting refugee groups for admission, "the plight of the refugees themselves as opposed to national origins or political considerations should be paramount." H.R. Rep. No. 608, *supra*, at 13. The statute enumerates several factors that may be considered during the consultative process, including the impact "on the foreign policy interests of the United States." The statute, however, does not identify numerical limits, special humanitarian concern, or a foreign policy impact for consideration in section 208(a) asylum or section 243(h) withholding decisions. The only statutory criterion for asylum is the well-founded fear standard contained in the refugee definition. I.N.A. § 208(a), 8 U.S.C. § 1158(a); I.N.A. § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (West Supp. 1992). Similarly, the sole criterion for section 243(h) withholding relief is a threat to "life or freedom ... on account of race, religion, nationality, membership in a particular social group, or political opinion." I.N.A. § 243(h), 8 U.S.C. § 1253(h)(1).

prisoners, who are trapped in their countries of origin.[30] This broadening of the definition of refugee to include those who are unable to leave their home countries comports with the Act's overall purpose to ensure access to protection to all persons regardless of their location.

This broadening reflected congressional concern for groups of persecuted persons who, because of "unusual circumstances," were unable to leave their home countries. The sponsor of the amendment, Representative Fascell, stated his understanding that section 207 overseas processing was for those refugees "who have not left" — and indeed are unable to leave — their countries of origin.[31] In particular, Congress had in mind detained political dissidents, prisoners, and others for whom it would be impossible or impractical to escape their countries.[32]

Indeed, the House Report expressly stated that this new procedure would "give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world ... Recent examples ... are the

[30]*See*, I.N.A. § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(B); I.N.A. § 207(e), 8 U.S.C. § 1157(e). Representative Zablocki summarized the broadened definition as follows:

> With respect to the U.S. foreign policy interests, the conference report retains the House version of the definition of "refugee." The House amendment specifically broadened the U.S. definition to bring it into line with the definition recognized by the United Nations, and included presidentially specified persons within their own country who are being persecuted or who fear persecution.

126 Cong. Rec. 4503 (1980) (remarks of Rep. Zablocki).

[31]125 Cong. Rec. 37,200-01 (1979) (remarks of Rep. Fascell).

[32]*See* Anker & Posner, *The Forty Year Crisis*, *supra*, at 60-61; *see also* Hearings on H.R. 2816, *supra*, at 24 (remarks of Rep. Holtzman and testimony of Attorney General Griffin Bell).

Chilean and Cuban prisoners brought directly into the United States . . . [and] prisoners in Argentina and other Latin American countries."[33] Similarly, a Senate Report stated that the definition of refugee was amended to "include 'displaced persons' . . . to handle such situations as the evacuation of Saigon . . . [and to] accommodate political prisoners and detainees who need resettlement opportunities outside their country."[34] Thus, Congress intended to expand refugee protections to reach those who are trapped in their home countries. It is entirely incongruous that the government now seeks to use overseas processing as a justification for forcing back those refugees who already have accomplished their escape from Haiti. *See* section IVB, *infra*.

III. CONGRESS ENACTED THE REFUGEE ACT OF 1980 IN PART TO LIMIT THE POLITICALLY-INFLUENCED EXECUTIVE DISCRETION THAT PREVAILED PRIOR TO ITS ADOPTION.

One of Congress' goals was to restrain the previously unfettered discretion of the executive in the area of refugee protection, asylum and admissions. The executive exercised such discretion prior to 1980 primarily through its parole authority.[35] Congress intended that the parole power in section 212(d)(5) of the I.N.A.

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[33]H.R. Rep. No. 608, *supra*, at 9-10; *see also Hearings on H.R. 2816, supra*, at 21 (testimony of Attorney General Griffin Bell). Dick Clark, Ambassador at Large and U.S. Coordinator for Refugee Affairs also stated that, "[w]e ought to be able to move people directly out of [their] country. . . . In the Cuban case, obviously, we are moving people directly out of Cuba. . . ." *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 69 (1979); *see also* Anker & Posner, *The Forty Year Crisis, supra*, at 60-61.

[34]S.Rep. No. 256, *supra* , at 4.

[35]*See*, former I.N.A. § 243(h), 8 U.S.C. § 1253(h) (1970) (amended 1980); former I.N.A. § 212(d) (5) 8 U.S.C. § 1182 (d)(5) (1970) amended 1980). Section 212(d)(5) gave the Attorney General discretion to parole into the U.S. persons during emergencies or when the Attorney General determined parole was in the public interest.

be used for the entry of otherwise inadmissible individuals.[36] However, starting with President Eisenhower's use of the parole provision to admit a large group of refugees from Hungary, the executive repeatedly used the parole authority to admit large groups of refugees *ad hoc* — often for expressly political reasons[37] — instead of individuals on a case-by-case basis.[38] In addition to the use of parole for overseas admissions, Congress had no statutory procedures for the granting of asylum protection to those in the United States or at its borders. The only domestic procedure was the withholding of deportation provision, which was purely discretionary and applied by the executive in a discriminatory manner.[39] The executive's discriminatory use of the parole

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[36] *See* Note, *Refugees Under United States Immigration Law*, 24 Clev. St. L. Rev. 528 (1975).

[37]*See* S. Rep. No. 256, *supra*, at 6 (reporting that of the 1,027,407 refugees admitted under parole programs, only about 2,700 were from noncommunist countries).

[38]The executive candidly admitted this overstepping of its authority:

> The parole, interestingly enough, is given exclusively to the Attorney General. After the fall of Saigon we brought in 133,000 Vietnamese in 1975 under the parole authority. We have done this now extensively all over the world. We had a parole for Lebanese; we had a parole for Argentines, we have other paroles for other groups.
>
> So, what we have really done is to develop a system outside of the legislative authority which was never, frankly, properly intended. The Attorney General is the first to say this.

Briefing on the Growing Refugee Problem: Implications for International Organizations, Hearings Before the Subcomm. on International Organizations of the House Comm. on Foreign Affairs, 96th Cong., 1st Sess. 10 (1979) (statement of Dick Clark, Ambassador at Large and U.S. Coordinator for Refugee Affairs).

[39]*See* n.23, *supra; see generally* Note, *Judicial Review of Administrative Stays of Deportation: Section 243(h) of the Immigration and Nationality Act of 1952*, 1976 Wash. U. L. Q. 59 (1976). When Congress amended the statute in 1980, it eliminated the requirement that the persecution be physical.

and withholding provisions continued even after the adoption of the U.N. Convention in 1967.[40]

Congress was aware of this history and repeatedly expressed concern during the 1970's that the Attorney General was exercising its discretion in a manner inconsistent with the nonideological and humanitarian goals of the U.N. Convention.[41] Legislators advanced various proposals to remedy the perceived defects in the law and to end the era of *ad hoc*, discretionary, and discriminatory decision-making.[42] None of these efforts, however, bore fruit until 1980. Congress' concern with the executive's use of politically

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[40]*See generally* Arthur C. Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 Mich. J.L. Ref. 243, 249-50 (1984). Regulations promulgated as late as 1974 afforded the Immigration and Naturalization Service ("INS") complete discretion over refugee admissions and failed to articulate any eligibility standards. *See* 8 C.F.R. §§ 108.1, 108.2 (1976); *Stevic*, 467 U.S. at 420 n.13. The regulations permitted the executive to continue its practice of adjudicating claims at least partially on the basis of foreign policy considerations; most notably, persons fleeing non-communist persecution were largely excluded from relief under section 243(h). *See* n.37 *supra,; see also* Note, *Political Bias in United States Refugee Policy Since the Refugee Act of 1980*, 1 Geo. Immigr. L.J. 495, 500-11 (1986); Note *Behind the Paper Curtain: Asylum Policy Versus Asylum Practice*, 7 N.Y.U. Rev. L. & Soc. Change 107, 123-25 (1978).

[41]*See* Anker & Posner, *The Forty Year Crisis, supra*, at 20-30; *see also Cardoza-Fonseca*, 480 U.S. at 435 n.16 (*citing* legislative materials concerning "various unacceptable geographic and political distinctions"); *id.* at 442 n.27 ("[t]he 1980 Act was the culmination of a decade of legislative proposals for reform in the refugee laws") (citations omitted); *Hearings on H.R. 3056, supra*, at 77 (remarks of Rep. Eilberg).

[42]For example, Representative Eilberg sponsored a refugee bill in 1977 that would have constrained executive discretion. During hearings on the bill, he stated:

> I am deeply concerned that, under current law and procedures, Congress has surrendered — to a great extent — its authority to regulate the flow of refugees to this country. Our bill represents an attempt to restore this authority and, at the same time, to establish a proper balance between the executive and the legislative branches

motivated selection criteria under pre-Act policy sounds as a recurrent theme in the legislative history of the Refugee Act.[43]

In particular, the Act's legislative history reveals that the executive's discriminatory policies in dealing with Haitian refugees during the 1970's constituted one of the motivating forces behind the Act.[44] Congressional hearings[45] and a special congres-

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> of Government in establishing the appropriate procedures governing their admission.

Hearings on H.R. 3056, supra, at 59 (statement of Rep. Eilberg, chairman of the Subcomm.); *see also Admission of Refugees into the United States, Part II: Parole of Additional 15,000 Indochina Refugees, Hearings Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 15 (1977) (statement of Rep. Eilberg).

[43]*See* Anker & Posner, *The Forty Year Crisis, supra*, at 34, 36, 41, 46-48, 56, 63, 88-89. Representative Rodino expressed this concern when introducing the legislation:

> Ever since the close of World War II, we have had to face emergent and unforeseen refugee situations in all parts of the world. For some of these emergencies we were able to respond by special legislation. For others, we have acquiesced in having the Attorney General use his "parole" authority under the Immigration and Nationality Act. The Attorney General is not comfortable with utilizing this authority and we, who have been closely associated with immigration and refugee matters, are also not comfortable with it.

125 Cong. Rec. 4798 (1979) (statement of Rep. Rodino); *see also id.* at 4800 (1979) (remarks of Rep. Holtzman echoing this concern).

[44]When introducing the final version of the legislation, Representative Holtzman stated that the Act would address the Haitian crisis by establishing a statutory procedure for processing asylum claims:

> With respect to the problem of the Haitians, this bill sets up for the first time in the country's history a statutory procedure for asylum. Whether any particular Haitian will qualify under the law for asylum is a matter to be determined by the Attorney General under appropriate regulations.

126 Cong. Rec. 4507 (1980) (statement of Rep. Holtzman). Representative Chisholm had previously brought the issue to the forefront, arguing at length that "Haitians are in fact political refugees." 125

sional report[46] on the mistreatment of Haitian asylum applicants — who had been denied due process rights in applying for protection under the regulatory asylum and the limited withholding provision of earlier law[47] — contributed to the introduction of

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Cong. Rec. 35,820 (1979) (remarks of Rep. Chisholm); *see also id.* at 35,820-25. Representative Chisholm explained:

> While supporting H.R. 2816, I also wish to briefly address the tragic plight of Haitian refugees. Since 1972, 8,000 to 10,000 black men, women, and children have fled the oppressive Duvalier regime and sought political asylum in the United States. Thousands have languished in South Florida for 5, 6, and up to 7 years, uncertain of their fate, and in desperate fear of forced return to Haiti. . . .
>
> The Haitian Government, the State Department, and INS would have us believe, these boat people are not political refugees, but rather flee to the United States for economic reasons. The Congressional Black Caucus has studied this question carefully and has concluded that there can be no doubt that Haitians are in fact political refugees.

125 Cong. Rec. 35,820 (1979) (remarks of Rep. Chisholm); *see also* 125 Cong. Rec. 23,251 (1979) (introduction and withdrawal of proposed Senate amendment to include Haitians expressly within the definition of "refugee").

[45] *Human Rights in Haiti: Hearings Before the Subcomm. on International Organizations of the House Comm. on International Relations*, 94th Cong., 1st Sess. (1975).

[46] *Haitian Emigration: Report of the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. (1976).

[47] Shortly after adoption of the Refugee Act, Senator DeConcini commented on the discriminatory treatment of Haitians to then Secretary of State Cyrus Vance:

> If you are a boat refugee from Cuba, INS automatically considers you a refugee. If you are boat refugee from Baby Doc's Haiti, INS automatically considers you an illegal alien coming to the United States for economic purposes.

United States Refugee Programs: Hearing Before the Senate Comm. on the Judiciary, 96 Cong., 2d Sess. 14 (1980) (remarks of Sen. DeConcini); *see generally* Alex Stepick, *Haitian Boat People: A Study in the Conflicting Forces Shaping U.S. Immigration Policy. U.S. Immigration Policy* 163 (1984 ed., Richard R. Hofstetter).

the statutory asylum provision into the proposed legislation.[48] Much of the floor debate on the bills that later became the Refugee Act was devoted to the then-occurring crisis of the Haitian boat people. *See* n.44, *supra*.

Congress' intent to restrain executive discretion is apparent in five of the Act's most important provisions.[49] First, Congress virtually eliminated the previously vast power of the Attorney General to parole particular groups of refugees into the U.S (and refuse to parole others), often for short-term foreign policy objectives. *See* pp. 18-20, *supra*. Second, Congress replaced the executive's ad hoc discretion under an administrative asylum procedure with section 208(a)'s statutory procedures. *See* section IIB, *supra*. As noted above, Congress was also motivated to

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[48] The subcommittee insisted on the need for statutory asylum procedures over INS objections that the amended section 243(h) was enough, referring to its report which criticized on due process grounds procedures followed by the INS in adjudicating Haitian asylum and section 243(h) claims. *Hearings on H.R. 3056*, supra, at 93 (remarks of Rep. Eilberg) ("[t]his subcommittee has criticized, in its recent report on Haitian emigration, the procedures followed by INS in adjudicating asylum and 243(h) claims"); *see also id.* at 126-27 (remarks of Rep. Holtzman); Anker & Posner, *The Forty Year Crisis*, *supra*, at 41. Witnesses who testified before the House subcommittee directed Congress' attention to the existing "procedures for determining asylum applications under section 243(h) [which were] woefully inadequate and . . . the subject of a civil suit recently filed in Miami on behalf of Haitian nationals." *Hearings on H.R. 2816*, *supra*, at 170 (testimony of A. Whitney Ellsworth and Hurst Hannum, Representatives, Amnesty International, U.S.A.). The same witnesses called for a "separate and uniform asylum procedure," a call heeded with Congress' provision of section 208(a).

[49] The House was so intent upon restraining executive discretion that its version of the bill provided a "legislative veto" over the executive's ability to admit refugees in excess of the then established "normal flow" of 50,000 refugee admissions per year. *See* 126 Cong. Rec. 4505 (1980) (remarks of Rep. Sensenbrenner). The Conference bill dropped this provision in favor of the Senate's version, but it was such a major concern that the final Conference bill only barely passed the House, 207 to 192. *See id.* at 4508 (1980).

create neutral and uniform statutory asylum procedures in part by the experience of the Haitian refugees in the 1970's. *See* nn.44-46, *supra.*

Third, when revamping procedures for processing and admitting refugees from abroad under section 207, Congress ensured its own role in checking executive discretion by mandating regular consultation between the executive and Congress, thereby routinizing congressional input into refugee policy and admissions.[50] This was of great import to Congress, especially in the House.[51] Fourth, Congress amended section 243(h) to prohibit the executive from deporting or returning any alien whose "life or freedom would be threatened" in his or her homeland. This protection had previously been reserved to the executive's absolute discretion and was rarely exercised in favor of the alien. *See* section IIA *supra.* Finally, Congress put an end to the era of executive-dominated and discretionary refugee admissions policies with their express geographical and ideological components in the definition of "refugee" by reaffirming the U.S.'s international obligations as a signatory of the U.N. Convention.

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[50]*See* n.29, *supra; see also* 125 Cong. Rec. 23,232 (1979) (statement of Sen. Kennedy) (Refugee Act "provides for the first time the statutory requirement that Congress be consulted before refugees are admitted, and defines and exerts congressional control over the process"). The President must submit a detailed report to Congress on the status of refugees throughout the world and a proposal for the admission of refugees into the United States. See I.N.A. § 207(d)(1), 8 U.S.C. § 157(d)(1) (West Supp. 1992). After congressional hearings on the President's proposal, a joint plan for the admission of refugees from the various regions of the world is adopted. *See* I.N.A. §§ 207(a)(3) and (d)(3), 8 U.S.C. §§ 1157(a)(3) and (d)(3) (West Supp. 1992); see also Carolyn P. Blum & Michael D. Laurence, *Cold Winds from the North: An Analysis of Recent Shifts in North American Refugee Policy,* 16 N.Y.U. Rev. L. & Soc. Change 55, 66 n.69 (1987-88). The President also must undertake appropriate consultation with Congress on any emergency refugee initiatives. *See* I.N.A. § 207(b), 8 U.S.C. § 1157(b) (West Supp. 1992).

[51]*See* 126 Cong. Rec. 4501-02 (1980) (remarks of Rep. Fish describing the final legislation's consultation provisions).

IV. THE GOVERNMENT'S ARGUMENTS IN DEFENSE OF THE ORDER ARE UNSUPPORTED BY THE LEGISLATIVE HISTORY OF THE REFUGEE ACT OF 1980.

A. The Legislative History Does Not Support the Government's Contention that Congress Amended Section 243(h) Only to Extend Withholding of Deportation Procedures to those in Exclusion Proceedings.

The Government argues that Congress removed the phrase "within the United States" from, and added the words "or return" to, the text of section 243(h) of the I.N.A. for the sole purpose of extending mandatory withholding of deportation to "excludable aliens who were apprehended at the border and paroled into the United States." *See* Brief for the Petitioners at 52-53. Specifically, the Government contends that Congress intended the amendment of section 243(h) to provide only for those persons with the same status as the plaintiff in the case of *Leng May Ma v. Barber*, 357 U.S. 185 (1958).[52] *See* Brief for the Petitioners at 53.

The legislative history of the Refugee Act does not support the Government's position. There is simply no mention of *Leng May Ma* anywhere in the legislative record. It is an odd construction of a statute that ignores its plain meaning in favor of a specific, narrow reading based on a twenty-year-old case, especially when

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[52]Leng May Ma was a Chinese woman who came to the United States in 1951. She was held in custody and later released on parole to give her the opportunity to prove her claim of citizenship. Three months later, after having failed to establish that claim, the INS ordered her deportation. The Supreme Court thereafter denied her application for withholding of deportation under the former section 243(h). In so ruling, the Court held that an alien initially taken into custody and subsequently paroled into the United States was legally considered outside the United States and, thus, not entitled to apply for withholding protection. *Leng May Ma*, 357 U.S. at 188; *see also Landon v. Plasencia*, 459 U.S. 21, 25 (1982); *Amanullah v. Nelson*, 811 F.2d 1, 7 (1st Cir. 1987); *Bertrand v. Sava*, 684 F.2d 204, 205 (2d Cir. 1982); *Pierre v. United States*, 547 F.2d 1281, 1289 (5th Cir.), *vacated on other grounds*, 434 U.S. 962 (1977); *Gerrero v. Moyer*, 738 F. Supp. 1164, 1165 (N.D. Ill. 1990).

the case itself was never mentioned in the extensive legislative history of the statute. Moreover, there is no other indication that Congress intended to restrict the protections of section 243(h) to the narrow class of persons who, like Leng May Ma, were paroled into the United States prior to their application for section 243(h) relief. If Congress had intended to so restrict this section, it could have achieved that result more easily and clearly than by removing the former requirement that persons be "within the United States." For example, following its choice of wording for section 208(a), Congress could simply have restricted section 243(h) to those applying at the border of the United States and who have been paroled temporarily into the United States.

Even if the Government were correct that the holding in *Leng May Ma* motivated Congress' concern when amending section 243(h), the Haitians before this Court qualify under the Government's construction of the provision. The *Leng May Ma* Court held that the plaintiff was not "within the United States" (and thus subject to exclusion proceedings and denial of withholding of deportation) because she had been apprehended and taken into custody before making an entry into the United States. The Court reasoned:

> For over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States. It seems quite clear than *an alien so confined* would not be "within the United States" for purposes of § 243(h).

Leng May Ma, 357 U.S. at 188 (citations omitted)(emphasis added).

In *Leng May Ma*, the Court found that parole was an extension of custody and cited cases equating parole and detention. *See id.* at 189 (*citing Kaplan v. Tod*, 267 U.S. 228, 230 (1925)). Leng May Ma's "in-custody" status was thus maintained even after she was paroled at large because of official U.S. intervention and authority over her. The Court concluded that Leng May Ma was not "within the United States" because U.S. governmental intervention prevented her from legally "entering" the United States. "Entry" is not accomplished until "physical presence of an alien in this country is accompanied *by freedom from official restraint.*"

United States v. Kavazanjian, 623 F.2d 730, 736 (1st Cir. 1980)(emphasis added)(*citing United States v. Oscar*, 496 F.2d 492, 493-94 (9th Cir. 1974); *Vitale v. INS*, 463 F.2d 579, 581-82 (7th Cir. 1972); *United States v. Vasilatos*, 209 F.2d 195, 197 (3d Cir. 1954); *Klapholz v. Esperdy*, 201 F. Supp. 294, 297 (S.D.N.Y. 1961), *aff'd*, 302 F.2d 928 (2d Cir.), *cert. denied*, 371 U.S. 891 (1962)).

The Haitian plaintiffs in this case share with Leng May Ma the status of having been apprehended and placed in U.S. custody before making an entry into the United States. Indeed, the Haitians' "in-custody" status is no legal fiction: the U.S. government is intercepting fleeing Haitians and returning them to Haiti through the exercise of physical force. Thus, even if the Government's construction that Congress revised section 243(h) to address concern over *Leng May Ma* is accepted, that concern would include the Haitians now before this Court.

B. The Legislative History Does Not Support the Government's Contention that Avenues of Refugee Protection Under Sections 243(h) and 208(a) May Be Denied to Haitians Because Section 207 Overseas Processing Is Available.

The Government's argument that returned Haitians may apply through a newly created overseas section 207 process is entirely inconsistent with the structure and purpose of the Refugee Act's comprehensive scheme. There is no precedent for the Government's position that one protection may be made available to the exclusion of the other two statutory protections. Section 207 was not intended to be, and is not structured in the Act as, a substitute for sections 243(h) and 208(a).

These three provisions appear in separate sections of the Act; they are not mutually exclusive and nothing in the Act renders them preclusive of each other. The administrative agency implementing the Act, though confronted with the question many times, has never held that the existence of an overseas process precludes access to other protections. Indeed, it has increasingly de-emphasized the avoidance of an overseas process as a

significant factor to consider in the exercise of administrative discretion under section 208(a).[53]

Moreover, there are clear differences in language, structure, and purpose between section 207 and sections 208(a) and 243(h). For example, numerical limits apply to the allocation of refugees abroad under section 207, and foreign policy is a statutorily permitted criterion in determining the designation of refugees as "of special humanitarian concern." In contrast, foreign policy is nowhere listed as a legitimate consideration in section 208(a) asylum or section 243(h) decisions, and numerical limits only apply after a person is granted asylum and applies for permanent residence status. *See* n.29, *supra.*

Finally, the implementation of the Act confirms that nationals from countries where an overseas section 207 process *exists* never have been denied access to other statutory protections. To the contrary, they have applied for and received protection under sections 208(a) and 243(h). For example, persons fleeing Afghanistan, Iran, the Soviet Union, Cuba, Vietnam, and Ethiopia, among others, are all able to apply for refugee status through section 207 overseas processing *and* apply for and receive asylum relief in the United States.[54] This practice — consistently applied for all groups until the Executive Order — is what is required by the language, structure, and purpose of the Refugee Act.

The nature and manner of establishment of the government's section 207 process for Haitians grossly distorts the protection

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[53]*See Matter of Pula,* Interim Dec. 3033 (BIA 1987). In *Pula,* the Board of Immigration Appeals modified its earlier holding in *Matter of Salim,* 18 I. & N. 311 (BIA 1982) (avoidance of a pre-existing overseas refugee process in a third country a major adverse factor to be considered in the exercise of discretion in asylum decisions). The Board has since denied very few asylum claims on discretionary grounds. *See* Deborah E. Anker & Carolyn P. Blum, *New Trends in Asylum Jurisprudence: The Aftermath of the U.S. Supreme Court's Decision in I.N.S. v. Cardoza-Fonseca.* J. Int'l Refugee L. 66, 68 (1989).

[54]During the first decade of the Refugee Act, as indicated in the table below, persons from countries where overseas processing was possible also applied for and received section 208(a) asylum protection:

purposes Congress attempted to effectuate in the Refugee Act. Section 207's overseas process was intended to provide special protection for "presidentially specified" persons who could not flee, *i.e.*, those who were trapped or even imprisoned by their persecutors.[55] The Executive Order does not specify Haitians for special concern nor create new avenues to assist Haitians in escaping their persecutors. To the contrary, it deliberately,

Nationality	207 Admissions	208(a) Applications/Grants
Afghanistan	24,344	1,241 / 468
Iran	34,520	21,961 / 13,411
USSR	201,240	837 / 624
Czechoslovakia	1,974	451 / 109
Hungary	5,690	841 / 219
Poland	36,085	9,086 / 3,013
Romania	37,172	2,675 / 1,676
Cuba	10,352	3,403 / 630
Vietnam	299,197	252 / 87
Ethiopia	23,610	5,102 / 2,422

Bureau for Refugee Programs, U.S. State Dep't, FY 1980-1991 cumulative refugee admission statistics, *reprinted in Refugee Reports,* Vol. 12, No. 12 at 10-11 (Dec. 30, 1991); INS, U.S. Dep't of Justice, June 1983-March 1991 cumulative asylum statistics, *reprinted in id.* at 12.

[55]Section 207 overseas procedures have been used almost exclusively as a means of admitting "presidentially specified persons within their own country who are persecuted or who are threatened with persecution." 126 Cong. Rec. 4499 (1980) (remarks of Rep. Holtzman); *see also* H.R. Conf. Rep. No. 781, *supra,* at 19. For example, with both the Orderly Departure Program in Vietnam begun in 1975 and the processing of Russian Jews in Moscow begun in 1988, the vast majority of those who apply have been granted refugee status (98.3% in FY 1991 under the Orderly Departure Program; 91.4% in FY 1991 under the Moscow program). *Refugee Reports, supra,* at 13. Haitians, however, have never been identified by the President as a group of special concern to the United States. Throughout the 1980's, only 1.8% of Haitian asylum claims were granted as compared, for example, to 74.5% of Soviet claims and 34.5% of Vietnamese. *Refugee Reports, supra,* at 12. True to precedent, Haitians now seeking refugee status at the U.S. Embassy in Port-au-Prince have approval rates of only 9.8%. Brief for the Petitioners at 8 (the Government reports that as of October 30, 1992, the embassy had received applications on behalf of 15,566 persons, and that 245 of the 2,505 applications adjudicated had been approved).

unabashedly returns them to the site of their persecution. With this Order, the government acts as a floating Berlin Wall, forcibly trapping those Haitians that seek to flee their persecutors. Thus, in conception and design, the Executive Order effectuates a complete reversal of the congressional goals embodied in the Refugee Act.

CONCLUSION

Because the Executive Order violates the language, structure, and intent of the Refugee Act of 1980, this Court should affirm the ruling by the United States Court of Appeals for the Second Circuit that the Order be enjoined as illegal.

Respectfully Submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

GENE McNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,

Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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No. 92-344

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GENE McNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,

Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*[1/]

Amicus Curiae The Association of the Bar of the City of New York (the "Association") has a great interest in the question presented in this case: whether the United States may summarily return Haitian aliens to Haiti, who have been

[1/] The parties have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court, pursuant to Rule 37.3 of the Rules of this Court.

intercepted on the high seas, without making individualized determinations regarding the validity of their asylum claims as required by both international and domestic law.

The Association is a professional association of approximately 19,000 lawyers throughout the United States and in over forty other countries. Since its inception in 1870, the Association has been dedicated to the preservation and advancement of the rule of law and the fair administration of justice. The scope of the Association's concern with justice has not been limited to the confines of the City of New York but extends beyond local borders.

For many years, the Committee on International Human Rights has been a standing committee of the Association. A 1985 Resolution of the Association states that "the Association of the Bar of the City of New York affirms its support for the Rule of Law in the international community ..." In its efforts to promote the rule of law, the Association has issued reports on international agreements and pending United States legislation relating to international human rights; filed *amicus* briefs in relevant court cases; intervened on behalf of foreign lawyers and judges who have been persecuted or imprisoned for exercising their professional responsibilities; and sent delegations to investigate human rights conditions in countries throughout the world and published the reports of their findings.[2/]

[2/] *See, e.g.*, DeWind and Kass, *Justice in El Salvador: A Report of a Mission of Inquiry*, 38 Record of the Association 112 (March 1983); Zabel, Orentlicher and Nachman, *Human Rights and the Administration of Justice in Chile*, 42 Record of the Association 431 (May 1987); Hellerstein, McKay and Schlam, *Criminal Justice and Human Rights in Northern Ireland*, 43 Record of the Association 110 (March 1988).

This case is of vital importance to the Association. The Association respects and supports the universally accepted principle of *non-refoulement*, *i.e.*, the prohibition against returning *bona fide* refugees against their will to their oppressors. This fundamental principle has long been embodied in customary international law as well as in multilateral treaties and bilateral agreements to which the United States is a party.

The end of the "Cold War" has not, unfortunately, resulted in a decrease in civil strife. On the contrary, long-seething animosities, formerly contained by the totalitarian regimes recently toppled throughout the world, have surfaced, resulting in floods of refugees all over the world. All civilized nations must meet the challenge of ensuring that the rights of innocent refugees are protected.

Yet, the universal prohibition against *non-refoulement* is meaningless unless refugees are provided an opportunity to present their case that they are, in fact, *bona fide* refugees, *i.e.*, that they harbor a well-founded fear of persecution in their home countries. Accordingly, as an organization of lawyers concerned with the enforcement of international law and treaty obligations and with the principle of due process of law, the Association is especially troubled by the Government's argument that the United States can circumvent the duty of *non-refoulement* by intercepting Haitian refugees before they reach the territory of the United States and summarily returning them to Haiti without affording them the opportunity to establish their status as refugees entitled to asylum. The answer to the question of whether the United States can thus evade its international humanitarian obligations bears directly on the larger question of whether

the community of nations will abide by the principle of *non-refoulement* in this crucial juncture in the history of nations.

The Association, therefore, strongly supports the arguments made by the respondents and other *amici* that the United States may not summarily return Haitian refugees interdicted on the high seas. The Association, in fact, in a letter dated July 21, 1992, urged President Bush to reverse the United States' policy of returning Haitian refugees without a hearing on the ground that the policy violates international and domestic law. In this *amicus* brief, the Association demonstrates that the United States' duty of *non-refoulement* under international and domestic law is not limited to the territory of the United States; it imposes obligations on the United States wherever it acts.

SUMMARY OF ARGUMENT

Petitioners assert that, by intercepting Haitian aliens on the high seas before they reach United States territorial waters, the duty of *non-refoulement* may be avoided. We respectfully submit that the United States is bound by the duty of *non-refoulement* wherever the Government may act, whether within the United States itself, in its territorial waters, on the high seas or on foreign soil. The prohibition against *refoulement* constitutes a *jus cogens* norm of international law, binding on all nations, in all places, and at all times (Point I *infra*). *Non-refoulement* is a universal duty: it has been recognized in the domestic laws of our sister nations, in international human rights agreements, and in statements of policy by United States officials (Point II *infra*). In fact, because the United States has also expressly assumed the duty of *non-refoulement* in an agreement with Haiti, the duty is part of United States domestic law (Point III *infra*).

ARGUMENT

I. THE UNIVERSAL DUTY OF *NON-REFOULEMENT* DOES NOT END AT A NATION'S BORDERS

The prohibition against returning a person to a potential oppressor—embodied in Article 33 of the "Refugee Convention"[3/]—is part of a larger and growing body of international human rights law which recognizes fundamental limitations upon the conduct of all nations in their dealings with individuals, whether citizens or aliens.

Prior developments in this law include (1) the ban on slavery, *see*, the Slavery Convention of 1926, 60 L.N.T.S. 253, 46 Stat. 2183, 2 Berans 607, T.S. 778 (1929), and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, September 7, 1956, 266 U.N.T.S. 3, 18 U.S.T. 3201, T.I.A.S. No. 6418, (2) the outlawing of genocide, *see*, the Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, (3) the prohibition against torture, *see*, the Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment, December 9, 1975, G.A. Res. 39/46, U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 at 6, and (4) the condemnation of state-imposed racial discrimination or *apartheid*, *see*, the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, and the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, November 30, 1973, 1015 U.N.T.S. 244.

[3/] United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, 19 U.S.T. 6259.

The underlying premise of these international conventions is that certain practices are so abhorrent that they may not be permitted anywhere in the world. *See*, *e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) ("deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties"). No nation may engage in such practices, and an individual's right to protection from them does not begin or end with the borders of any particular state. *See*, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (Edwards, J., concurring) ("commentators have begun to identify a handful of heinous actions — each of which violates definable, universal and obligatory norms").

One commentator has stated the point thus:

> Under international customary law, a country is not free to commit violations of human rights within *or without* its borders.

Leh, *Remedying Foreign Repression Through U.S. Courts*, 20 Int'l L. & Pol. 405, 458 (1988) (emphasis added). *See also*, Bailey, *Current and Future Legal Uses of Direct Broadcast Satellites in International Law*, 45 La. L. Rev. 701, 717 (1985) ("the protection of basic human rights *irrespective of national borders* has become customary international law") (emphasis added).

At least two Courts of Appeals have recognized that basic human rights protections, in fact, constitute *jus cogens* or peremptory norms. *See, In re Estate of Ferdinand E. Marcos Human Rights Litigation Agapita Trajano*, — F.2d —, 1992 U.S. App. LEXIS 26680 (9th Cir. October 21, 1992) (torture is clear violation of *jus cogens* norm); *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988) (hereinafter "*CUSCLIN*"). A *jus cogens* norm "enjoy[s] the highest status within international law." *CUSCLIN*, 859 F.2d at 940. Unlike an ordinary norm of customary international law, a *jus cogens* norm is a "norm from which no derogation is permitted." Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, T.S. No. 58 (1980), 8 I.L.M. 679 (1979), *entered into force* January 27, 1980, art. 53. *See also,* Restatement (Third) of the Foreign Relations Law of the United States (1987) (hereinafter "Restatement (Third)"), § 102, comment k ("some rules of international law are recognized by the international community of states as peremptory, permitting no derogation."); § 102, comment j; § 331, comment e, Reporters' Note 4 (discussing peremptory norms that are of superior status and which cannot be affected by treaty).

In *CUSCLIN*, the D.C. Circuit noted that the "fundamental human rights law that prohibits genocide, slavery, murder, torture, prolonged arbitrary detention, and racial discrimination" constituted one of the few categories of norms that "arguably do meet the stringent criteria for *jus cogens*." 859 F.2d at 941. *Accord*, Restatement (Third), § 702. The Court of Appeals further stated that:

> Such basic norms of international law as the proscription against murder and slavery may well have the domestic legal effect that appellants suggest. That is, *they may well restrain our government in the same way that the Constitution restrains it*. If Congress adopted a foreign policy that resulted in the enslavement of our citizens or of other individuals, that policy might well be subject to challenge in domestic court under international law.

Id.

That certain fundamental norms, such as *jus cogens* norms, transcend the consent of states was articulated during the Nuremberg trials following World War II. The international tribunal formed by the United States and other Allied nations found that certain "crimes against humanity," including murder, deportation or other persecution based on political or racial grounds, could be punished under international law "whether or not in violation of the domestic law of the country where perpetrated." *See*, Charter of the International Military Tribunal, August 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 279. Similarly, the International Court of Justice, in *The Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, 1970 I.C.J. 3, 32, held that "the basic rights of the human person" are so important that they represent obligations of the states towards the international community as a whole."

The right of *non-refoulement* has become one of the human rights norms recognized as *jus cogens*:

> The principle of *non-refoulement*, usually referred to only in its refugee law application,

> is also part of human rights law and humanitarian law, and is acknowledged as a *jus cogens* norm. The *jus cogens* nature of the right of *non-refoulement* is especially apparent because the later [sic] doctrine imposes obligations on states not involved in the acts that lead to the flight of the victim ... However, in all its applications, the right of *non-refoulement*, like all *jus cogens* norms, exists outside of treaties, and is non-derogable, binding and judicially enforceable.

Parker and Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 Hastings Int'l and Compl. L. Rev. 411, 435-36 (1989) (footnotes omitted). *See also*, Report of United Nations High Commissioner for Refugees, 40 U.N. GAOR, Supp. No. 12 at 6, U.N. Doc. A/40/12 (1985) ("Due to its repeated reaffirmation at the universal, regional and national levels, the principle of *non-refoulement* has now come to be characterized as a peremptory norm of international law."); Cartagena Declaration on Refugees, 1984-1985 Annual Report of the Inter-American Commission on Human Rights, at 177-182 (OEA/Ser. L/V/II.66/doc. 10, rev. 1), conclusion 5 (*Non-refoulement* is "a cornerstone of the international protection of refugees. This operative principle concerning refugees should be recognized in the present state of international law, as a principle of *jus cogens*.")

Significantly, the Refugee Convention originally *did* contain an optional geographic (and temporal) limitation, restricting application of the convention to persons made refugees because of "events occurring in Europe before 1 January 1951." *See*, the Refugee Convention, Art. I, Section B(1)(a). To suggest that the United States' duty of *non-refoulement* is somehow geographically limited, petitioners disingenuously cite various portions of the original Refugee Convention reflecting that option.[4/] The United States, however, was not a party to the original Refugee Convention, and needless to say, never exercised the option to limit its scope. In fact, the option to restrict the Refugee Convention's application to Europe was—as far as the United States and other new parties were concerned—*eliminated* in the 1967 United Nations Protocol Relating to the Status of Refugees (hereinafter the "1967 Protocol"). *See*, the 1967 Protocol, October 4, 1967, 606 U.N.T.S. 277, 19 U.S.T. 6223, T.I.A.S. 6577, Art. I(3) ("The present Protocol shall be applied by the States Parties hereto *without any geographic limitation*, save that *existing* declarations made by States *already* Parties to the Convention in accordance with article 1B(1)(a) of the Convention, shall, unless extended under article 1B(2) thereof, apply also under the present Protocol") (emphasis added).[5/] In any event, the United States acceded

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[4/] *See, e.g.*, Brief for the Petitioners at 41.

[5/] Petitioners assert that Article 40 of the original Refugee Convention, rather than Article I(B)(1)(a), controls the issue of territorial application and that Article 40 was left unchanged by the 1967 Protocol (*see*, Art. 7.4 thereof). However, Article 40 only permits (indeed encourages) a state to *extend* the obligations of the Refugee Convention to "all or any of the territories for the international relations of which [the state] is responsible" (Art. 40(1)). Article 40 does *not* provide that the state may limit its own duties under the Refugee Convention. Thus, while Article 40 would allow the United States to bind, for example, Puerto Rico, to the convention, it does not permit the United States to absolve itself of responsibility for its actions merely because they may have occurred outside the United States itself. For further discussion of the petitioners' mistaken reliance on Article 40, *see generally*, the Brief of *Amicus Curiae* United Nations High Commissioner for Refugees in Support of Respondents, Point II(D).

to the 1967 Protocol with only two reservations, *neither of which objected to the unlimited geographic scope of the duty of non-refoulement in light of the 1967 Protocol. See,* Presidential Proclamation (Lyndon B. Johnson), 19 U.S.T. 6257-58 (November 6, 1968).

In sum, the petitioners are gravely mistaken when they seek a geographic limitation to the ban against *refoulement*.[6/] As a *jus cogens* norm, the prohibition is of universal application, applying to every nation wherever it may act. *See, e.g.*, Parker and Neylon, 12 Hastings Int'l and Compl. L. Rev. at 455 ("*jus cogens* obligations transcend national boundaries").

6/ The petitioners' position is particularly perverse in that it revives the long-discredited view that a person's human rights depend upon geography. It was, after all, the belief of the nineteenth-century southern slave owners that the right to freedom suddenly vanished south of the Mason-Dixon line. Moreover, the petitioners' interdiction program bears a disturbing similarity to the practices of that era. Then, too, the federal government returned oppressed men and women to their persecutors. *See, Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 60 S.Ct. 691 (1857) (Campbell, J., concurring) ("The Federal Constitution [the fugitive slave clause] and the Acts of Congress [the fugitive slave laws] provide for the return of escaping slaves within the limits of the Union").

II. STATE PRACTICE CONDEMNS *REFOULEMENT* WHEREVER IT OCCURS

In determining the scope of Article 33(1)'s application, full account must also be taken of state practice since the Refugee Convention went into effect. Article 31(1) of the Vienna Convention on the Law of Treaties provides:

> (1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose ...
>
> (3) There shall be taken into account, together with the context ... (b) any *subsequent practice* in the application of the treaty which establishes the agreement of the parties regarding its interpretation ...

(emphasis added). The "practice of states" may be gleaned from several sources including (1) domestic statutes; (2) judicial opinions and administrative decisions of the various nations; (3) subsequent regional or international instruments through which states participate in further specifying, clarifying, pronouncing or developing shared norms to which they assent; and (4) official statements of policy. *See*, Restatement (Third), § 102, comment b; Carter and Trimble, *International Law* 113-114 (1991); *see generally*, Bowett, *The Law of International Institutions* (4th ed. 1982).

A. The Domestic Laws Of Other Nations Recognize The Duty Of *Non-Refoulement* Without Regard to National Borders

Many nations have incorporated Article 33(1)'s prohibition against *refoulement* of political asylum seekers into domestic statutory provisions which expressly provide or indicate that the norm applies regardless of whether a refugee has entered national territory. *See*, Appendix (Belize, Bolivia, Burundi, Canada, the Dominican Republic, Ecuador, Finland, Lesotho, Malawi, Nicaragua, Nigeria, Peru, Spain, Sweden, Switzerland; and Zimbabwe).

Tellingly, the recently-enacted Canadian refugee law permits the Minister of Immigration to interdict ships *outside* Canada's territorial waters, in a contiguous zone, but only once "all passengers who seek Convention refugee status and are nationals or citizens of the country where the vehicle embarked them have been *removed* from the vehicle and brought into Canada." An Act to Amend the Canadian Immigration Act, 1976 and the Canadian Criminal Code in Consequence Thereof, S.C. 1988, ch. 36 clause 8, § 91.1(1.1)(b) (Appendix, ¶ 4). An earlier version of the Canadian legislation, which would have permitted the Minister to interdict and turn away ships at sea without inquiring into the passengers' claims of refugee status, was criticized and ultimately rejected by the Canadians as an evasion of the duty of *non-refoulement*:

> The Committee has ... concluded that ships should not be turned around at sea but should be brought to port ... The only appropriate treatment for passengers who claim to be refugees is speedy and just processing

> according to the laws which apply to all refugee claimants, whether they arrive by air, land or sea.

Canadian Senate's Standing Committee on Legal and Constitutional Affairs, Report on Bill C-84, 2d Sess., 33d Parl., 1986-87, ¶ 47, *reprinted in* Hathaway, *Postscript—Selective Concern: An Overview of Refugee Law in Canada,* 34 McGill L.J. 354, 355 n.2 (1989). *See also*, Segal, *Restructuring Canada's Refugee Determination Process: A Look at Bills C-55 and C-84*, 29(3) *Les Cahiers de Droit* 733, 758, 735.

A recent administrative decision of the Netherlands demonstrates that a state is bound by its Article 33 obligations even in the territory of another state. In rejecting an application for political asylum made at the Dutch embassy in Kuwait (on a ground permitted by the Refugee Convention),[7] the Netherlands acknowledged that it was bound by the obligations of the Refugee Convention even on foreign soil, namely, at its overseas embassy in Kuwait. *See*, Letter from the Dutch Minister of Foreign Affairs, July 8, 1992, no. 9110.15.0232 (regarding asylum claim of Weshah Abdelhadi Wesha Gadallah).

The actions of the above nations collectively establish a state practice consistent with the Second Circuit's findings that "what *is* important under Article 33.1 is where the refugee is to be returned *to* ... without regard to where the refugee is to be returned *from*[,]" and that "Article 33.1's

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[7] The asylum applicant was eligible, as a Palestinian in the Middle East, for assistance and protection from a United Nations agency. See, the Refugee Convention, art. 1(D).

prohibition against 'return' plainly applies to *all* refugees, regardless of location." *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1350 (2d Cir. 1992) (emphasis in original). *See also*, *de Casariego v. Uruguay*, Selected Decisions Under the Optional Protocol of the United Nations Human Rights Commission, U.N. Doc. CCPR/C/OP/1, 92, 94 (1981), ¶ 10.2 (in case involving claimant who was forcibly abducted in Brazil by Uruguayan agents, United Nations Human Rights Committee held that Article 1 of Optional Protocol to the International Covenant on Civil and Political Rights—providing "individuals subject to its jurisdiction"—refers "not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.") *quoted in*, Etzwiler, *The Treatment of Asylum Seekers at Ports of Entry and the Concept of "International Zones,"* in *The Effects of Carrier Sanctions on the Asylum System* (pamphlet published by the Danish Refugee Council) (October 1991) at 19.[8/]

A nation's duty of *non-refoulement* does not stop at its borders, because international human rights obligations "are coextensive with States' exercise of authority and jurisdiction, and not solely with the geographic land mass that States acknowledge as their 'territory.'" Etzwiler, at 19. Moreover,

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8/ Geography is irrelevant because, "in scrupulously observing *non-refoulement*, the state [is] acting on behalf of the international community." Goodwin-Gill, *The Refugee in International Law* 119 n.81 (1983). *See also*, Crawford and Hyndman, *Three Heresies in the Application of the Refugee Convention*, vol. 1, no. 2 Int'l J. Refugee L. 155, 171 (April 1989) ("The obligation of *non-refoulement* is an obligation to or in respect of the individual refugee, or alternatively to the international community as a whole.").

when a state reaches out and exercises its authority and jurisdiction on the high seas, "international law and the laws of a flag-state (the state whose nationality a ship carries) apply." Misra, *The Implications of Interdiction at Sea*, Refuge 4 (March 1988). Thus, United States Coast Guard cutters necessarily carry with them, wherever they may go, the international and domestic human rights obligations of the United States. *See*, Foighel, *The Legal Status of the Boat People*, 48 *Nordisk Tidsskrift for International Ret 233* (1979) ("the state of the flag cannot evade its liability for the persons rescued, where a rescue operation has resulted in refugees coming under the custody of the vessel").

B. Regional Blocs Of Nations Have Incorporated The Duty Of *Non-Refoulement* Into Multilateral Instruments

At least three regional multilateral instruments have incorporated the principle of *non-refoulement*, demonstrating that the duty transcends *national* borders. In 1967, the Committee of Ministers of the Council of Europe recognized the obligation of *non-refoulement* as follows:

> [Member states should] ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion *or any other measure* which would have the result of compelling him to return to, or remain in, territory where he would be in danger of persecution[.]

Res. (67)14 on Asylum to Persons in Danger of Persecution (June 29, 1967) (emphasis added). Similarly, in 1969, the duty of *non-refoulement* was adopted by the Organization of

American States, *see*, the American Convention on Human Rights, November 22, 1969, art. 22(8), and by the Organization of African Unity, *see*, Convention on Refugee Problems in Africa, September 10, 1969, art. II(3).

C. *Refoulement* Has Been Condemned By The United States Itself

Significantly, *refoulement* by other nations has been routinely condemned by *the United States* in official statements of policy. For example, in criticizing the "push-backs" of Vietnamese boat people into the sea by Asian nations, Secretary of State James Baker said: "It is no secret we do not support involuntary repatriation." *Baker Rejects Asian Criticism of U.S. Over Boat People,* Reuters, July 26, 1990. In 1988, the U.S. Ambassador to Thailand, William A. Brown, sent a letter to that nation's foreign minister calling for an end to push-backs of Laotian refugees. Refugee Reports, A Project of the American Council for Nationalities Service, vol. 9, no. 3 (March 18, 1988). The following year, the Senate passed Concurrent Resolution 26 urging first asylum countries of the Association of Southeast Asian Nations to reinstate the practice of providing refuge to all asylum seekers and pointing out that "given Vietnamese attitudes toward illegal departure, *forced repatriation of refugees to Vietnam should not be considered a viable*

option." 135 Cong. Rec. S. 6354 (June 7,1989) (emphasis added).

In 1990, the Bush administration actually led the international community in denouncing Great Britain's policy of forcibly returning Vietnamese refugees who had fled to Hong Kong. Condemning involuntary repatriation "in principle and in practice," the United States called for a one-year moratorium on repatriation and "full international monitoring of the process leading to any mandatory return." N.Y. Times, January 25, 1990, § 1 at 5. This strong stand was taken by the United States even though the British policy, unlike the current United States policy toward Haitians, required that all Vietnamese refugees be interviewed to determine the substance of their claims. Only those determined to be economic migrants, as opposed to political asylees, were repatriated by the British. *See*, Wash. Post, January 26, 1990, at A18.

It should be noted that many of the push-backs of Vietnamese refugees did not actually result in *refoulement,* because the asylum-seekers were not pushed all the way back to the country where they faced political persecution. These push-backs thus did not flagrantly violate Article 33(1) in the way the Haitian interdiction program does, but were nonetheless condemned by the United States.

In short, the duty of *non-refoulement* is not only a universally recognized obligation, it is a duty which the United States has repeatedly demanded that other nations observe. The United States must demand no less of itself. Indeed, in light of this nation's shameful decision to turn away Jewish refugees aboard the St. Louis and other ships

fleeing from Nazi Germany during World War II,[9/] the United States must fully discharge its duty towards the Haitians to avoid further dishonor. As Judge Hatchett has pointedly noted:

> The United Nations Protocol on Refugees, and the United States immigration laws which execute it, were motivated by the World War II refugee experience. Jewish refugees seeking to escape the horror of Nazi Germany sat on ships in New York Harbor, only to be rebuffed and returned to Nazi Germany gas chambers. Does anyone seriously contend that the United States' responsibility for the consequences of its inaction would have been any less if the United States had stopped the refugee ships *before* they reached our territorial waters? Having promised the international community of nations that it would not turn back refugees at the border, the government yet contends that it may go out into international waters and actively prevent Haitian refugees from reaching the border. Such a contention makes a sham of our international treaty obligations and domestic laws for the protection of refugees.

Haitian Refugee Center, Inc. v. Baker, 949 F.2d 1109, 1112 (11th Cir. 1991), *cert. denied*, — U.S. —, 112 S.Ct. 1245 (1992) (Hatchett, J., dissenting) (emphasis in original).

[9/] *See*, 2 Encyclopedia of the Holocaust 1412-13 (1990); Thomas and Witts, *Voyage of the Damned* (1974); Morse, *While Six Million Died: A Chronicle of American Apathy* (1967), ch. XV.

III. THE UNITED STATES INCORPORATED THE DUTY OF *NON-REFOULEMENT* INTO U.S. DOMESTIC LAW BY ENTERING INTO THE 1981 U.S.-HAITI AGREEMENT

The United States is also obligated to abide by the principle of *non-refoulement* by its own domestic law—the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 8 U.S.C. § 1243 (1980) *see*, Brief of Respondents, and the provisions of the bilateral executive agreement signed with the Government of Haiti; *see*, the Agreement Effected by Exchange of Notes, signed at Port-au-Prince, September 23, 1981, T.I.A.S. No. 10,241, 33 U.S.T. 3559 ("1981 U.S.-Haiti Agreement").[10/]

The 1981 U.S.–Haiti Agreement is a bilateral application of the principal of *non-refoulement*. That Agreement authorized the United States to return "detained vessels and persons to a Haitian port" but expressly acknowledged that, even on the high seas, the United States was bound by "international obligations mandated in the Protocol Relating to the Status of Refugees." The 1981 U.S.-Haiti Agreement states as follows:

> Having regard to ... the international obligations mandated in the Protocol Relating to the Status of Refugees ... the United States

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[10/] The Second Circuit did not reach or decide the issue of whether the Kennebunkport Order is invalid under the 1981 U.S.-Haiti Agreement. This Court has repeatedly held that respondents are "entitled under our precedents to urge any grounds which would lend support to the judgment below." *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977). *See also*, *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982).

> Government confirms with the Government of the Republic of Haiti its understanding of the following points ...
>
> It is understood that under these arrangements the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status.

1981 U.S.-Haiti Agreement, at 1-2.

As explained above, the Refugee Convention unconditionally prohibits the return of a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." *See*, the Refugee Convention, as amended by the 1967 Protocol, Art. 33.

The United States explicitly acknowledged its binding obligation not to return any refugees interdicted on the high seas to the country from which he flees persecution under Executive Order No. 12,324, 50 Fed. Reg. 48,109 (September 29, 1981), *reprinted in* 8 U.S.C. § 1182. The Order's key provisions were Section 2(c)(3), which required "that no person who is a refugee will be returned [to Haiti by the Coast Guard] without his consent," and Section 3, which mandated that:

> The Attorney General shall, in consultation with the Secretary of State and the Secretary of the Department in which the Coast Guard is operating, take whatever steps are necessary to ensure the fair enforcement of

> our laws relating to immigration ... and the *strict observance of our international obligations concerning those who genuinely flee persecution in their homeland*. (Emphasis added).

Only one month earlier, the Justice Department's own legal counsel had examined the legality of the proposed interdiction program to determine whether the INS plan "comports with the Protocol." The opinion concluded that, when interdicting Haitians on the high seas, the United States was obliged under Article 33 to ensure the "[i]ndividuals who claim that they will be persecuted ... *must be given an opportunity to substantiate their claims*." *Proposed Interdiction of Haitian Flag Vessels*, 5 Op. Off. Legal Counsel 242, 248 (1981) (emphasis added).

As an executive agreement authorized by law, the 1981 U.S.-Haiti Agreement has the force of a treaty and is enforceable in U.S. courts as domestic law. *United States Dept. of Defense v. Federal Labor Relations Authority*, 685 F.2d 641, 648 (D.C. Cir. 1982); *United States v. Belmont*, 301 U.S. 324, 331 (1937); Henkin, *Foreign Affairs and the Constitution* (1972), at 184-87; *see also, B. Altman & Co. v. United States*, 224 U.S. 583, 601 (1912). Moreover, it is beyond question that executive agency actions have long been subject to judicial review on the merits for their conformity with executive agreements. *Air Canada v. United States Dept. of Transp.*, 843 F.2d 1483 (D.D.C. 1988) (reviewing agency action for consistency with United States-Canada executive agreement); *see also, Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 230 (1986) (reviewing executive order for conformity with treaty); *British Caledonian Airways, Ltd. v. Bond*, 665 F.2d 1153, 1161-62 (D.C. Cir. 1981) (determining "whether FAA administrator

acted consistently with and followed the procedures mandated by the various international agreements" is a question requiring legal inquiry making judicial review appropriate).

It is also clear that, as individuals directly benefited by the *non-refoulement* provisions of the 1981 U.S.-Haiti Agreement, the Haitian refugees affected by the Kennebunkport Order have standing to bring an action to enforce the provisions of that Agreement. Where a treaty protects a particular class of persons who claim injury (in this case, Haitians interdicted by the United States on the high seas), those persons should have standing to enforce the treaty. *See, Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 475 (1982); *see also*, *Cook v. United States*, 288 U.S. 102 (1933) (individuals have standing to raise violations of extradition treaties); *Ford v. United States*, 273 U.S. 593 (1927); *United States v. Rauscher*, 119 U.S. 407 (1886).

Therefore, the international duty of *non-refoulement* is also an obligation of United States domestic law, which may be raised by the victims of the unlawful Haitian interdiction program.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

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APPENDIX

Domestic Statutory Provisions of Various Nations Demonstrating *Non-Refoulement* Extends Beyond National Frontiers*/

1. In Belize, the Refugees Act of August 24, 1991, Article 14(1) (emphasis added), provides:

> Notwithstanding the provisions of any other law, no person shall be refused entry into Belize, expelled, extradited or returned from Belize to any other country or *be subjected to any similar measure* if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country where (a) he may be subjected to persecution ...; or (b) his life, physical integrity or liberty would be threatened ...

2. In Bolivia, *Decreto Presidencial No. 19640, Artículo 5 [4 junio, 1983]*, provides:

> *La declaración de refugiado concede al extranjero la protección dispensada por el Estado que consiste en la no devolución al país, sea o no de origen, donde su derecho a la vida o a la libertad personal esté en riesgo de violacón a causa de los motivos señalados en los artículos 1 y 2, en virtud del principio establecido en el artículo 33 de la Convención de 1951 sobre el Estatuto de los Refugiados y en el artículo 22, inciso 8, de Convención Americana de los Derechos Humanos y [...]rde con lo estipulado en la Constitución Politica del Estado, Título Primero "Derechos y deberes fundamentales de la*

---

*/ The text of the foreign language statutes which appear in this Appendix in English translation only (Finland and Sweden) were obtained from the REFLEG database of the United Nations High Commissioner for Refugees.

Persona" y Título Segundo "Garantías de la Persona".

(The declaration of refugees gives all aliens the protection ... that consists of no-return to a country, whether or not of origin, where her right to life or personal liberty is at risk of violation caused by one of the reasons indicated in articles 1 and 2, by virtue of the principle established in article 33 of the 1951 Convention relating to the Status of Refugees and in article 22, part 8, of the American Convention of Human Rights and [...] the stipulation in the Political Constitution of the State, Title 1 "Rights and Fundamental Personal Obligations" and Title 2 "Personal Guarantees".)

3. In Burundi, *Decret-Loi No. 1/23 Du 9 Juillet 1982 Portant Reglementation de L'Acces Au Burundi, Du Sejour, De L'Etablissement Et De L'Eloignement Des Etrangers, Titre II: Les Refugies - Chapitre 2: Non-Refoulement Des Refugies, Article 32*, provides:

> *En aucun cas, l'étranger reconnu comme réfugié ne peut être renvoyé dans un pays où son retour est exclu en vertu de l'application du principe de non-refoulement.*
>
> (In each case, an alien recognized as refugee cannot be returned to a country where her return is prohibited by virtue of the application of the principle of *non-refoulement*.)

4. In Canada, An Act to Amend the Immigration Act, 1976 and the Criminal Code in Consequence Thereof, S.C. 1988,

ch. 36, § 8(1) [adding § 91.1(1.1) to the Immigration Act, 1976, S.C. 1976-77, ch. 52] (emphasis added), provides:

> 91.1(1) Subject to subsection (1.1), where the Minister believes on reasonable grounds that a vehicle within twelve nautical miles of the outer limit of the territorial sea of Canada is bringing any person into Canada in contravention of this Act or the regulations, the Minister may direct the vehicle not to enter the internal waters of Canada or the territorial sea of Canada ...
>
> (1.1) The Minister may make a direction under subsection (1) where the Minister is satisfied that
>
> (a) the vehicle can return to its port of embarkation without endangering the lives of its passengers;
>
> (b) *all passengers who seek Convention refugee status and are nationals or citizens of the country where the vehicle embarked them have been removed from the vehicle and brought into Canada;*
>
> (c) the country where the vehicle embarked its passengers is a signatory to the Convention and complies with Article 33 thereof; and
>
> (d) the country would allow the passengers to return to that country or to have the merits of their claims to Convention refugee status determined therein.

5. In the Dominican Republic, *Decreto Presidencial No. 2330 de 10 setiembre de 1984, Reglamento de la Comision Naciónal Para Los Refugiados, Capitulo IV, Artículo, 13,* provides:

Ningún refugiado podrá ser puesto en las fronteras, por expulsión o devolución, de territorios donde su vida o su libertad peligre por causa de raza, religión, nacionalidad, pertenencia a determinado grupo social o de su opiniones políticas.

(No refugee can be placed in the borders, by expulsion or return, of the territory where her life or liberty is endangered because of race, religion, nationality, membership in a particular social group or political opinions.)

6. In Ecuador, Decreto No. 3293; Reglamento para la aplicación en el Ecuador de las normas contenidas en la Convención de 1951 sobre el estatuto de los refugiados y en su protocolo de 1967, Capitulo IV, Artículo 18 [30 septiembre 1987] (emphasis added), provides:

Ninguna persona será rechazada en la frontera, devuelta, expulsada, o sujeta a medida alguna *que le obligue a retornar a un territorio donde su integridad fisica o su libertad personal está en riesgo a causa de las razones mencionadas en los Articulos 1 y 2 presente Reglamento.*

(No one shall be refused at the border, returned, expelled *or subjected to any measure* which would obligate her to return to a territory where her physical integrity or personal liberty is at risk for any of the reasons mentioned in Articles 1 and 2 of this law.)

7. In Finland, the Aliens Act of March 1, 1991, Section VI - Refusal of Entry Into Finland and Removal from Finland, Article 38, provides:

Procedure for Refusal of Entry Into Finland at a Frontier. Refusal of entry is to be effected without delay at a passport control station or elsewhere as soon as it has been ascertained that an alien is not entitled to enter Finland. No one should be returned to an area where he may be subjected to inhuman treatment, or persecution under the terms of Article 30, or to an area from which he may be further sent to such an area.

8. In Lesotho, the Refugee Act of 1983, Article 11 (emphasis added):

A person shall not be rejected at any Lesotho frontier or be expelled *or otherwise compelled to return* or to remain in a country . . . where he may be tried or punished for offences of a political character[.]

9. In Malawi, the Refugee Act of May 8, 1989, Article 10(2), provides:

(1) A refugee shall not be expelled or returned to the borders of a country where his life or freedom will be threatened on account of (a) his race, religion, nationality or membership of a particular social group or political opinion; or (b) external aggression, occupation, foreign domination or events seriously disturbing the public order in either part or the whole of that country.

(2) A person claiming to be a refugee shall be permitted to enter and remain in Malawi for such period as the Committee may require to process his application for refugee status.

10. In Nicaragua, *Reglamento de Ley Creadora de la Oficina Nacional para refugiados, Artículo 16 [6 avril 1984]*, provides:

> *Al margen de la determinación de la solicitud de la condición de refugiado, prevalecerá el principio de no devolución al territorio en el cual pueda peligrar su vida o libertad del individuo.*
>
> (At the point of determining a claim of the condition of a refugee, will prevail the principle of no-return to a territory in which one's life or individual liberty is endangered.)

11. In Nigeria, the National Commission for Refugees, etc., Decree 1989, Part I, Article 1(1) [December 29, 1989] (emphasis added), provides:

> As from the commencement of this Decree and notwithstanding any other law or enactment, no person who is a refugee within the meaning of this Decree shall be refused entry into Nigeria, expelled, extradited or returned *in any matter whatsoever* to the frontiers of any territory where (a) his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular group or political opinion; or (b) his life, physical integrity, or liberty could be threatened on account of external aggression, occupation, foreign domination or events seriously disrupting public order in any part of the whole of that territory.

12. In Peru, *Decreto Presidencial No. 1 Aprobando el Reglamento que Ordene La Situación Juridica de los*

Refugiados y Asilados Politicos en El Peru, Capitulo III, Artículo 54 [25 enerio, 1985], provides:

> *[E]l Ministerio del Interíor evitará la devolución del extranjero al país en que su vida, libertad o integridad personal se encuentran seriamente amenazadas por las causales a que se refiere el artículo 7 del presente Reglamento.*
>
> (The Minister of the Interior will avoid returning the alien to a country where her life, liberty or personal integrity would be seriously threatened by causes referred to in article 7 of this law.)

13. In Spain, *Ley 5/1984, de 28 de marzo, reguladora del derecho de asilo y de la condición de refugiado, Título primero: del Asilo; Capitulo I: Disposiciones generales, Artículo 2*, provides:

> *El asilo es la protección graciable dispensada por el Estado, en el ejercicio de su soberania, a los estranjeros que se encuentren en alguna de las circunstancias previstas en el artículo 3 y que consiste en la no devolución al Estado donde sean perseguidos ...*
>
> (Asylum is the protection graciously given by the state, in the exercise of its sovereignty, to aliens who find themselves in any of the circumstances anticipated in article 3 and which consist of a no-return to a state where she would be persecuted ...)

14. In Sweden, the Aliens Act of July 1, 1990, Article 2, provides:

When a refusal of entry order or an expulsion order is to be put into effect, the alien may not be sent to a country where he risks persecution, nor to a country where he is not safeguarded against being sent on to a country where he risks such persecution.

15. In Switzerland, *loi sur l'asile* (law on asylum), *du 5 octobre 1979*, article 45(1) (emphasis added), provides:

Principe de non-refoulement,(1) Aucune personne ne peut être contraite, de quelque, manière que ce soit, *à se rendre dans un pays où sa vie, son intégrité corporelle ou sa liberté serait menacée par l'un des motifs mentionnés à l'article 3, 1er alinéa, ou encore d'où elle risquerait d'être astreinte à se rendre dans un tel pays.*

(Principle of *non-refoulement*. (1) No one shall be constrained, *in any manner whatsoever,* to be returned to a country where her life, bodily integrity or liberty would be threatened for any of the reasons mentioned in article 3, clause 1, or also [to a third country where] she would risk being constrained to be returned to such a country.)

16. In Zimbabwe, the Refugee Act of 1983, Article 13(1) (emphasis added), provides:

Notwithstanding the provisions of any other law, no person shall be refused entry into Zimbabwe, expelled, extradited or returned from Zimbabwe to any other country or *be subjected to any similar measure,* if as a result of such refusal, expulsion, return or other measure such person is compelled to return to or remain in a country where (a) he may be

subjected to persecution on account of his race, religion, nationality, membership of a particular social group or political opinion; or (b) his life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disrupting public order in part or the whole of that country.

(19)

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No. 92-344

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,
Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

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BRIEF OF FEDERATION FOR AMERICAN IMMIGRATION REFORM, AMICUS CURIAE, SUPPORTING REVERSAL

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IN THE

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On Writ Of Certiorari
To The United States Court Of Appeals
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BRIEF OF FEDERATION FOR AMERICAN IMMIGRATION REFORM, AMICUS CURIAE, SUPPORTING REVERSAL

The Federation for American Immigration Reform (FAIR), as an amicus curiae, urges this Court to reverse the judgment of the United States Court of Appeals for the Second Circuit in this case.

INTEREST OF AMICUS CURIAE

FAIR is a nonprofit corporation that is recognized by the Internal Revenue Service as a tax-exempt charitable and educational organization. Since its

founding in 1978, FAIR has been studying the environmental, economic, and social impact of legal and illegal immigration into the United States. FAIR disseminates the results of its studies and other information on national immigration policy to its members, educational institutions, and policymakers through newsletters, reports, and testimony to Congress.[1]

FAIR is guided in its work by a National Board of Advisors, many of whom have academic or professional expertise on the subject of immigration. Alan C. Nelson, a member of the National Board of Advisors, was Commissioner of the Immigration and Naturalization Service from 1981 to 1989. He is familiar with the origins of the Haitian interdiction program and has contributed to this brief as co-counsel.

FAIR urges that the judgment of the Second Circuit in this case be reversed. FAIR supports the reasoning of the Government petitioners on the legal issues raised in their petition for a writ of certiorari and does not repeat their arguments in this brief. Instead, this brief brings to this Court's attention two additional matters that are relevant to this case: (1) an informed statement of the immigration policy context of the Haitian interdiction program, including the findings of a FAIR task force to Haiti on the extent of political persecution in that country, and (2) an argument that the respondents have no standing to challenge actions of the U.S. Government to stop unlawful attempts by aliens to enter the United States.

[1] FAIR has approximately 50,000 members, including 4,100 in Florida, where many illegal immigrants from Haiti have attempted to settle.

STATEMENT OF THE CASE

FAIR relies on the petitioners' Statement of the Case and highlights here only those aspects of the case history relevant to the argument in this brief.

In 1980 thousands of illegal immigrants from Cuba and Haiti began arriving on the Florida coast by boat. For the most part the Cubans did not have access to boats in their own country and were transported in boats owned by U.S. residents. The U.S. Government brought the Cuban "boatlift" to an end by taking action against the boat owners, including seizure of the boats. The Haitians, in contrast to the Cubans, arrived mostly in Haitian-owned boats, which they abandoned on arrival. Seizure of boats would not have impeded the illegal influx of Haitians. Instead, in 1981 the Coast Guard commenced a program of interdicting boats thought to be carrying illegal Haitian immigrants. Because many of the boats were not seaworthy, the Haitians were removed from the boats and returned to Haiti. The Haitian interdiction program has significantly reduced the number of Haitians attempting to enter the United States illegally by boat.

The Haitian interdiction program has always been accompanied by procedures that permit Haitians who fear persecution by their government to seek admission to the United States. Initially, claims of persecution by interdicted Haitians were heard aboard Coast Guard vessels. When a district court order temporarily suspended repatriation of any Haitians after the 1991 coup d'etat in Haiti, the hearing of persecution claims was shifted to the Guantanamo Bay Naval Base, where Haitian interdictees were held

pending the resumption of repatriation. After repatriations were resumed, the U.S. Government established facilities in the Haitian capital of Port-au-Prince to accept and process claims for admission to the United States on the basis of persecution.

Organizations in the United States that disapprove of the interdiction program have challenged its legality in three Circuits. The initial challenge by the Haitian Refugee Center was defeated when the District of Columbia Circuit held that the Center's interest in associating with Haitians seeking to immigrate illegally to the United States did not establish standing to challenge the interdiction program. *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 800-07 (D.C. Cir. 1987). Although the Haitian Refugee Center joined individual Haitian plaintiffs to its subsequent challenge in the Eleventh Circuit, the Eleventh Circuit held that the individual Haitian plaintiffs, being aliens outside the United States, also had no right of judicial review. *Haitian Refugee Center v. Baker*, 953 F.2d 1498, 1505-07 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992). In the latest challenge, filed in the Second Circuit, the Haitian Centers Council has replaced the Haitian Refugee Center as the organizational plaintiff and different Haitian nationals are named as individual plaintiffs. The Second Circuit found that the individual Haitian plaintiffs did have standing and instructed the district court to issue an order that forbids the petitioners from repatriating any interdicted Haitian who is threatened with persecution. The order does not specify how the petitioners are to know which of thousands of Haitian interdictees would be so threatened. The order was stayed by this Court and is under review here.

In the Second Circuit litigation, the courts below have made observations about the political situation in Haiti that seem to go beyond the specific findings of fact.[2] Federal courts do, of course, routinely take cognizance of "all matters of general knowledge". *Muller v. Oregon*, 208 U.S. 412, 421 (1908). Such matters form the context in which specific findings of fact are interpreted. However, the contextual assumptions that seem to have informed the decisions below in this case are not consistent with FAIR's own on-site findings regarding the political situation in Haiti. Also, the decisions below did not expressly consider the national immigration policies that are the context in which the Haitian interdiction program was established and operates. Those policies, while sometimes contrary to the interests of individual Haitians, serve many important national interests, as well as the interests of refugees and immigrants from countries other than Haiti. To bring these contextual matters to the attention of this Court, the argument in this brief is preceded by a Statement of Context that outlines the interests served by national immigration policy and summarizes the findings of a FAIR task force to Haiti.[3]

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[2] For example, the district court stated that repatriation of Haitians would be returning them "to the jaws of political persecution, terror, death, and uncertainty". *See* Pet. App. at 167a. The respondents made comparable statements about Haiti in their opposition to the Government's petition, including statements that "political violence in Haiti" has "spiraled to unprecedented levels" and that the interdiction program has encircled Haiti with a "Floating Berlin Wall" that "bars refugees from escaping persecution and death". Resp. Opp. to Cert. at 2, 8.

[3] This Court has found contextual information furnished by

STATEMENT OF CONTEXT

The Immigration and Nationality Act (INA) provides for the admission of 675,000 immigrants per year, not counting refugees.[4] Approximately 90 percent of those immigrants come from developing countries in Asia and Latin America, with more admissions from Haiti than from almost any other country.[5] Most of those admitted are relatives of other recent immigrants.[6]

Immigration to the United States, one of the few countries in the world that admits immigrants, cannot provide relief from poverty or oppression to more than a tiny fraction of the world's rapidly growing population. In 1990 world population was approximately 5.3 billion and was growing at the rate of approximately one billion persons per decade.[7] Ninety percent of this growth was occurring in developing

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amici curiae to be useful in cases that have broad public policy implications. *See, e.g., Regents of the University of California v. Bakke*, 438 U.S. 265, 316-17, 321-24 (1978) (admission policies of universities); *Roe v. Wade*, 410 U.S. 113, 148-52 (1973) (medical data on early pregnancy); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 56-57 n.111 (1973) (practical consequences of nullifying state taxing system).

[4] 8 U.S.C. § 1151(c)-(e) (Supp. III 1991).

[5] 8 U.S.C. § 1151(b) (1988). In 1988 only Korea, Mexico, and the Philippines provided more immigrants than Haiti. Immigration and Naturalization Service, *1990 Statistical Yearbook of the Immigration and Naturalization Service* 52-53 (Dec. 1991) [hereinafter *1990 INS Yearbook*].

[6] *1990 INS Yearbook*, *supra* note 5, at 54-57.

[7] Source: Population Division, United Nations, *cited in* Robert W. Fox & Ira H. Mehlman, *Crowding out the Future* 50-51 (1992).

countries.[8] The time in human history when large-scale migrations were a viable solution to economic and social problems has come to an end.

Congress imposes statutory ceilings on immigration admissions based on this country's capacity to absorb immigrants.[9] However, many aliens who are excluded by these ceilings attempt to immigrate illegally. Some enter the United States legally, as tourists or students, and fail to return home when their visas expire. Others enter surreptitiously, by land or by sea. In 1990, the Immigration and Naturalization Service ("INS") apprehended more than a million aliens attempting to enter the United States without visas.[10] Although a majority of illegal immigrants come from countries that are proximate to the United States, such as Mexico and Haiti, a large number come from elsewhere. For example, the Coast Guard and the INS are intercepting a growing number of ships carrying Chinese nationals who have been recruited to work in illegal "sweatshops".[11]

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[8] *Id.*

[9] *See, e.g.*, S. Rep. No. 55, 101st Cong., 1st Sess. at 10-11 (1989).

[10] *1990 INS Yearbook*, *supra* note 5, at 166.

[11] In the past year freighters and "fishing boats", each containing more than 100 illegal immigrants from China, were intercepted by the Coast Guard or INS in the harbors of Los Angeles and Honolulu and off the Atlantic and Pacific coasts. *See* Lena H. Sun, *Smuggling of People, Goods Is Big Business in China*, The Washington Post, Sept. 5, 1992, at A1; David Perlmutt, *Chinese Aliens to Face Judge in Texas - Refugees Found On Taiwanese Freighter in Good Spirits*, The Charlotte Observer, Sept. 11, 1992, at 4C; Berkely Hudson & Greg Krikorian, *160 Rescued From Sinking Fishing Boat*, The Los Angeles Times, Sept. 13, 1992, at B1.

Large-scale illegal immigration can have adverse effects on the well being of American citizens and the large number of immigrants already living here. Maintaining air and water quality and disposing of hazardous and other wastes have become increasingly problematic in the urban areas where most immigrants settle as the size and density of their populations have increased.[12] Labor economists have identified the influx of millions of alien workers into central city and agricultural labor markets during the past 25 years as a key factor in the stagnation or decline of wages in those markets.[13] The increased tendency for illegal alien workers to be accompanied or joined by their families, who often are dependent upon state hospitals and other public welfare services, has imposed a growing fiscal burden on the localities where they reside.[14]

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[12] Based on U.S. Census Bureau figures, the population density of the New England and the New York coastal region now exceeds that of El Salvador and Haiti, the two most densely populated countries in the Western Hemisphere. Fox & Mehlman, *supra*, at 38-39.

[13] Vernon M. Briggs, Jr., *Mass Immigration and the National Interest* 185-223 (1992); George J. Borjas, *Friends or Strangers - The Impact of Immigrants on the U.S. Economy* 97-114 (1990).

[14] The annual cost to San Diego County of providing services to 200,000 undocumented aliens exceeds the local taxes they pay by $146 million. *See* Auditor General of California, *A Fiscal Impact Analysis of Undocumented Immigrants Residing in San Diego County* (Aug. 1992). The costs to Los Angeles County in 1991 of providing public services to 950,000 illegal alien family members, net of federal and state aid and taxes collected from illegal alien households, was $500 million. *See* County of Los Angeles, *Impact of Undocumented Persons and Other Immigrants on Costs, Revenues and Services in Los Angeles County* ("Final Draft") (Oct. 14, 1992).

Some immigrants come to this country to escape political or religious persecution. The INA contains special provisions for aliens who are unable or unwilling to return to their own countries because of a "well-founded fear of persecution".[15] If they are present in the United States or at a port of entry, they may apply for "asylum", a status that allows them to remain in the United States indefinitely.[16] The filing of asylum applications has increased in recent years. In no year prior to 1980 did the number of applications exceed 6,000.[17] By 1989 asylum applications exceeded 100,000 per year.[18]

The multiplication of asylum applications has put great pressure on the adjudication facilities of the INS. Because asylum applicants are within the United States, they have rights of administrative appeal and judicial review that can be used to extend the adjudication process for years. Because the objective of most immigration litigation is to keep the alien in the United States as long as possible, dilatory tactics are common.[19] Many illegal aliens who file asylum applications after being apprehended fail to appear at their

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[15] 8 U.S.C. §§ 1101(a)(42), 1157-59 (1988).

[16] 8 U.S.C. § 1158 (1988).

[17] *1990 INS Yearbook*, *supra* note 5, at 105.

[18] *Id.*

[19] *See, e.g., Ballenilla-Gonzalez v. INS*, 546 F.2d 515, 521 (2d Cir. 1976) (referring to "the practice, all too frequently adopted by aliens once they become subject to a deportation order, of using the federal courts in a seemingly endless series of meritless or dilatory tactics designed to stall their departure from the country as long as possible"), *cert. denied*, 434 U.S. 819 (1977); *Acevedo v. INS*, 538 F.2d 918 (2d Cir. 1976); *Fan Wan Keung v. INS*, 434 F.2d 301 (2d Cir. 1970).

hearings.[20] Their chances of remaining indefinitely in the country as illegal immigrants are good because the costs of finding and deporting an alien who is inside the country are very high.[21]

Aliens who are outside the United States and have a "well-founded fear of persecution" may be admitted to the United States as "refugees" under the Refugee Act of 1980.[22] The purpose of the Refugee Act was to replace the "piecemeal approach of our Government reacting to individual refugee crises" with a "permanent and systematic procedure for the admission to this country of refugees".[23] The Refugee Act contemplates the admission of up to 50,000 refugees per year. 8 U.S.C. § 1157 (1988). The determination of which refugees will be admitted, and whether the normal ceiling of 50,000 will be exceeded, is made by the President in consultation with Congress. *Id.* In every year since the Refugee Act was enacted, refugee admissions have exceeded the 50,000 ceiling.[24] 132,000 refugee admissions are authorized for the current fiscal year.[25]

According to the United Nations High Commissioner on Refugees, there are between 15 and 17

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[20] *1990 INS Yearbook*, *supra* note 5, at 105 (Table 29: NOTE).

[21] While the illegal immigrant population in the United States is estimated to be in the millions, the INS succeeded in deporting only 25,228 aliens in 1990, the last year for which statistics are published. *1990 INS Yearbook*, *supra* note 5, at 166.

[22] Pub. L. No. 96-212, 94 Stat. 102 (1980).

[23] S. Rep. No. 256, 96th Cong., 1st Sess. 3 (1979).

[24] *1990 INS Yearbook*, *supra* note 5, at 103 (Table 26).

[25] Presidential Determination 93-1, 57 Fed. Reg. 47,253 (Oct. 15, 1992).

million refugees who have fled their countries and cannot return.[26] Uncountable millions of people threatened by persecution remain in their native countries because they cannot leave. Even if U.S. refugee admissions were a large multiple of current levels, only a minute fraction of the world's persecuted people would be accommodated.

Aliens generally do not qualify for admission to the United States as refugees unless they are outside their native countries. 8 U.S.C. § 1101(a)(42) (1988). The President, however, may specify exceptions, and has done so for Cuba, Haiti, El Salvador, Guatemala, Vietnam, and the former Soviet Union.[27] Consequently, Haiti is one of the few countries in which an alien who fears persecution may apply for admission to the United States as a refugee without having fled his own country.

Haitians who reach the United States as illegal immigrants are able to bypass the refugee program for aliens outside the United States and gain access to the asylum program for aliens within the United States. The advantages of bypassing the refugee program are that (1) refugee admissions are numerically limited, while asylum approvals are not; (2) refugee admission decisions are not subject to judicial review, while asylum adjudications are; (3) most refugees are not admitted until a U.S. organization agrees to sponsor their resettlement; and (4) refugee applicants who

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[26] Al Kamen, *Cold War Consensus on Refugee Aid Ebbing Despite Relentless Need*, The Washington Post, July 20, 1992, at A8.

[27] 8 U.S.C. § 1101(a)(42) (1988); Presidential Determination 93-1, *supra* note 25, at 47,254.

are denied admission remain outside the United States, while unsuccessful asylum applicants, being already within the United States, can often remain here by avoiding apprehension and deportation. In effect, Haitians who manage to reach the United States by illegal means gain significant advantages over those who do not.

Although the U.S. Government has no legal obligation to provide asylum hearings to aliens who are stopped outside the United States while attempting to enter this country illegally, the Government had been doing so for interdicted Haitians until the courts below intervened in the conduct of the interdiction program. Therefore, when the Government shifted asylum processing from the Guantanamo Bay Naval Base to Port-au-Prince in Haiti, FAIR sent a three-person task force to Haiti to study the economic and political situation in that country so that FAIR could take a position on this policy based on first-hand knowledge of the situation in Haiti.

During the week of June 15-19, 1992, the FAIR task force conducted extensive interviews with human rights organizations, representatives of international and private volunteer organizations, Haitian scholars and intellectuals, high level U.S. Embassy personnel, and repatriated Haitians. The task force learned that 20 years of deforestation and soil erosion in Haiti had produced an economic crisis for the rural population, causing migration from the countryside into the capital city of Port-au-Prince, where public services and economic opportunities were inadequate to meet the needs of the burgeoning urban population. This economic deterioration was exacerbated by the O.A.S. embargo that followed the 1991 coup.

The FAIR task force found no evidence of systematic persecution or intimidation of political opponents by the national government of Haiti. On the contrary, the task force spoke with many opponents of the current regime, none of whom showed any fear of expressing their views in public. The absence of systematic persecution applied equally to repatriated Haitians. The task force did find that some parts of Haiti were less safe than others because of intimidation or harassment by local officials or police acting on their own. The task force found no evidence that Haitians who entered the U.S. Embassy to file asylum applications were subject to interference or retribution by the government. Access to the Embassy by Haitian nationals was unimpeded and generally unmonitored by the Haitian government. Also, Haitians were allowed to submit applications at sites other than the Embassy. For the convenience of this Court and the parties, the report of the FAIR task force is attached as an Appendix to this brief.

The report of the FAIR task force is consistent with the position of the petitioners that political persecution is not so widespread in Haiti as to justify a presumption that more than a small number of those seeking to enter the United States illegally are fleeing persecution. Instead, the overwhelming majority are "economic migrants", seeking to escape the economic troubles of their native country.

SUMMARY OF ARGUMENT

The extraterritorial application of 8 U.S.C. § 1253(h) need not be decided by this Court because the respondents have no standing to seek its enforcement

by the federal courts. Two arguments sustain this conclusion.

I. A uniform body of decisional law, endorsed by this Court, has denied to aliens outside the United States judicial review of the Government's administration of the immigration laws absent an explicit statutory grant of the right to judicial review, and no such grant exists in this case. Since mass illegal migration from Haiti became a serious national problem in 1980, every change in the Government's program to stop Haitians from attempting to reach the United States in boats has been an opportunity for a new court challenge, and every court decision has become subject to reconsideration by structuring a new class of Haitians whose interests are allegedly injured. The history of this case proves the wisdom of this Court's long-standing injunction against judicial interference in the administration of the immigration laws at the behest of aliens outside the country.

II. Even under the basic Constitutional criteria, the respondents lack standing to challenge their repatriation under the Government's interdiction program. The Haitians are interdicted only because they are breaking U.S. laws. They are repatriated only because leaving them in unseaworthy boats would endanger their lives. Illegal immigrants from any country have no "legally protected interest" in burdening an immigration law enforcement program with court-ordered measures to convert it into an asylum program. Haitians who fear persecution by their government may apply in Haiti for admission to the United States under the refugee program enacted by Congress. If any repatriated Haitians are persecuted because they

cannot migrate to the United States, their injury is "traceable" to their failure to qualify under the statutory refugee program, not to the actions of the Coast Guard to stop their illegal entry into the United States in the manner that least endangers their lives. Determinations under the refugee program are not reviewable, and an alien should not be permitted to obtain review by violating U.S. immigration laws.

ARGUMENT

The legal premises of the Second Circuit's judgment are that (1) 8 U.S.C. § 1253(h) is a restriction on the President's authority to stop aliens from attempting to enter the country illegally and (2) the federal courts have jurisdiction to enforce this restriction in suits filed by aliens who are outside the United States.

The Government's petition argues persuasively why 8 U.S.C. § 1253(h) has no extraterritorial application and why the respondents' challenge to the interdiction program was precluded by collateral estoppel. However, if this Court were to reverse the Second Circuit's judgment solely on the basis of an interpretation of 8 U.S.C. § 1253(h) or an application of collateral estoppel, challenges to the Government's efforts to stop mass illegal migration from Haiti are likely to be reinstituted, possibly with a redesigned class of Haitian plaintiffs, based on other statutory or constitutional rights that allegedly are being violated. To foreclose such challenges and free the Executive Branch of district court micromanagement of national immigration policy, this Court should address the original defect in this litigation, which is that the challenge to the Haitian interdiction program, having

now progressed through three Circuits, should not have been heard in the first place.

The respondents whose "injuries" were to be relieved by the district court order were Haitian nationals who had been or might in the future be interdicted by the Coast Guard as they engaged in unlawful attempts to enter the United States.[28] These respondents had no standing to challenge any aspect of the interdiction program. First, as aliens outside the United States, they have no standing to challenge the administration or enforcement of U.S. immigration laws under the jurisdictional precedents that apply to immigration cases. Second, their status as aliens attempting to enter the United States illegally precludes satisfaction of the basic Constitutional requirements of injury to a "legally protected interest" and "traceability" of the alleged injury to the challenged Government action.[29]

I. As aliens outside the United States, the Haitian respondents lack standing to challenge the Government's administration and enforcement of U.S. immigration laws.

The question of whether, and to what extent, 8 U.S.C. § 1253(h) ties the President's hands in preventing mass illegal migration is a question that should not be decided by a federal court. That is the

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[28] *Haitian Centers Council v. McNary*, 969 F.2d 1350, 1354-55 (2d Cir. 1992).

[29] The standing issue was not raised as such in the petition for writ of certiorari, but that does not prevent this Court from addressing this or any other jurisdictional impediment to the suit. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546-47 (1986); *Juidice v. Vail*, 430 U.S. 327, 331 (1977).

clear implication of a century of jurisprudence on the law of immigration. *In United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950), this Court observed that the power to exclude aliens from the United States was a "fundamental act of sovereignty" that inhered in both the legislative and the executive branches. Accordingly, judicial intervention in the enactment and administration of immigration laws occurs only when it is "authorized by treaty or by statute, or is required by the paramount law of the Constitution". *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101-02 n.21 (1976).

Because aliens outside the United States acquire Constitutional protection only when they come within the territory of the United States, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-71, *reh'g denied*, 494 U.S. 1092 (1990), judicial intervention at the behest of aliens outside the United States can be based only on statute, *Kleindienst v. Mandel*, 408 U.S. 753 (1972). "Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, *unless expressly authorized by law*, to review the determination of the political branch of the Government to exclude a given alien." *Knauff v. Shaughnessy*, *supra*, at 543 (emphasis added). Among the compelling reasons for judicial restraint is that it would open the federal courts to claims from a practically limitless number of claimants. *Lem Moon Sing v. United States*, 158 U.S. 538, 541-42 (1895).

Following this Court's guidance, the federal courts have, with considerable consistency and uniformity, refused to entertain challenges to the administration of immigration laws by aliens who were outside the

United States. The right of judicial review has been denied whether the challenge was premised on refugee status, employment status, or having a relative in the United States. *See Adams v. Baker*, 909 F.2d 643 (1st Cir. 1990) (denied review of visitor admission decision); *Centeno v. Shultz*, 817 F.2d 1212 (5th Cir. 1987) (denied review of visitor eligibility), *cert. denied*, 484 U.S. 1005 (1988); *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970 (9th Cir. 1986) (denied review of employment eligibility); *Te Kuei Liu v. INS*, 645 F.2d 279 (5th Cir. 1981) (denied petition to reopen deportation proceeding); *Ventura-Escamilla v. INS*, 647 F.2d 28 (9th Cir. 1981) (denied review of special immigrant status classification); *Wan Shih Hsieh v. Kiley*, 569 F.2d 1179 (2d Cir.) (denied review of request to compel INS to complete investigation of marriage validity), *cert. denied*, 439 U.S. 828 (1978); *Rivera de Gomez v. Kissinger*, 534 F.2d 518 (2d Cir. 1976) (denied review of immigrant eligibility); *Cobb v. Murrell*, 386 F.2d 947 (5th Cir. 1967) (denied review of employment eligibility); *Braude v. Wirtz*, 350 F.2d 702 (9th Cir. 1965) (denied review of employment eligibility); *United States v. Phelps*, 22 F.2d 288 (2d Cir. 1927) (denied review of challenge to immigration regulations), *cert. denied*, 276 U.S. 630 (1928). The alien plaintiff's lack of standing is not cured by including a U.S.-based relative or organization as co-plaintiff. *Centeno v. Shultz*, *supra* (co-plaintiff U.S. relatives); *Chinese American Civic Council v. Attorney General*, 396 F. Supp. 1250 (D.D.C. 1975), *aff'd on other grounds*, 566 F.2d 321 (D.C. Cir. 1977) (co-plaintiff U.S. organization); *Braude v. Wirtz*, *supra* (co-plaintiff U.S. employers).[30]

[30] The respondents refer to this line of jurisprudence as "anomalous" and state that the federal courts "have repeatedly permitted aliens located outside of the United States to obtain judicial review of immigration decisions affecting them". Resp. Opp. at 14. The respondents cite three cases in support of this statement. In two of the three cases the challenged immigration actions were orders of deportation issued while the alien was present in the United States. *Juarez v. INS*, 732 F.2d 58 (6th Cir. 1984); *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977). Cases that involve actions to expel aliens who are already in the United States have no relevance to the standing of aliens who are outside the United States. In the third case, *Silva v. Bell*, 605 F.2d 978 (7th Cir. 1979), the class that was certified for the suit did include aliens both inside and outside the United States. There, however, the court concluded that "weeding out" the nonresident numbers of the class would have been "costly and time-consuming" and would have forestalled relief for the thousands of class members who were present in the United States. *Id.* at 984. It is *Silva* that is "anomalous".

The respondents make two arguments in opposition to this long line of Supreme Court and lower court precedents: (1) the decisions really did not depend on the location of the alien but upon the nature of the visa issuance process, and (2) the case law originated prior to the Administrative Procedure Act (APA) and has therefore lost its vitality outside of narrow areas where preclusion of judicial review is codified.[31] Both arguments are refuted by this Court's decision in *Brownell v. Tom We Shung*, 352 U.S. 180 (1956). In *Brownell* this Court held that, under the APA, judicial review of an exclusion order was not precluded simply because the INA designated the administrative decision on the order as "final". Sixty years before, this Court had held that an administrative decision designated "final" under an immigration statute was not reviewable. *Lem Moon Sing v. United States*, 158 U.S.

[31] Resp. Opp. at 14-15 n.18.

538 (1895). In clarifying the change wrought by the APA to the reviewability of immigration actions, this Court also made clear what was *not* changed: "We do not suggest, of course, that an alien who has never presented himself at the borders of this country may avail himself of the declaratory judgment action by bringing the action from abroad." 352 U.S. at 184 n.3.[32] In addition to showing that the APA did not change the standing rule for aliens outside the United States, the Court's statement also makes clear that the location of the alien at the time of the challenged immigration action is of paramount importance.

Although the jurisdictional impediment to "actions from abroad" in immigration cases has not always been characterized as a lack of standing on the part of the alien plaintiff, that is the most apt description because the position of the plaintiff has been the decisive factor in denial of judicial review.

> Although standing in no way depends upon the merits of the plaintiff's contention that particular conduct is illegal, . . . it often turns on the nature and source of the claim asserted. . . . Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.

[32] As the petition notes, 5 U.S.C. § 702(1) provides the required flexibility under the APA to preserve pre-APA jurisdictional limits on "subjects inappropriate for judicial action". Pet. at 28.

Warth v. Seldin, 422 U.S. 490, 500 (1975) (citations omitted).[33]

When the interdiction program was challenged in the Eleventh Circuit, the Court of Appeals correctly held that the INA provides no right of review of claims for asylum or withholding of deportation "at the behest of aliens beyond our borders". *Haitian Refugee Center v. Baker*, *supra*, 953 F.2d at 1505. When the interdiction program was again challenged in the Second Circuit, the Court of Appeals held simply that "the [screened-out Haitian] plaintiffs do have standing because . . . they are asserting a right, under § 243(h) of the INA and Article 33 of the Refugee Convention, not to be returned to Haiti". *Haitian Centers Council v. McNary*, *supra*, 969 F.2d at 1356. The Second Circuit's failure to acknowledge the force of this Court's rulings against judicial intervention, and the position of the respondents that this Court's statement in *Brownell* on alien standing is "dictum",[34] warrant restatement by this Court of the jurisdictional rule that should have stopped this litigation at the time it commenced.

II. As illegal immigrants, the Haitian respondents lack the "legally protected interest" and the injury "traceable" to the Government's immigration law enforcement program required to establish standing to challenge that program.

The constitutional requirements for standing are threefold: (1) "injury in fact" to a "legally protected

[33] The standing doctrine "embraces several judicially self-imposed limits on the exercise of federal jurisdiction" in addition to the Constitutional requirements. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

[34] Resp. Opp. at 14.

interest", (2) a "causal connection" between the injury and the challenged action ("traceability"), and (3) a likelihood that a favorable decision will address the injury ("redressability"). *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992). The alleged injury to the individual Haitian respondents does not satisfy the requirements of relation to a "legally protected interest" and "traceability" of the alleged injury to the interdiction program.

Haitian nationals are interdicted at sea because their attempt to enter the United States without a visa and without proper inspection and examination are a crime.[35] The Government's actions to prevent this crime do not diminish any procedural or substantive immigration rights of the Haitian respondents that they would enjoy if they had not broken the law. They remain eligible for admission to the United States as refugees if they qualify under the program enacted by Congress for aliens outside the United States. Haitians who seek to bypass the refugee program by entering the country illegally have no "legally protected interest" in not being interdicted and repatriated.

In *Burrafato v. United States Department of State*, 523 F.2d 554 (2d Cir. 1975), *cert. denied*, 424 U.S. 910 (1976), the Second Circuit held that federal courts did not have jurisdiction to hear the challenge of an illegal alien to the State Department's failure to follow its own regulations in deporting him. The Second Circuit held that if the alien "were legally within the

[35] 8 U.S.C. § 1325(a) (1988). A first attempt constitutes a Class B misdemeanor, and each subsequent attempt constitutes a Class E felony. 18 U.S.C. § 3559(a) (1988).

United States, he might well have standing in the federal courts to require the Department of State to follow its own regulations . . . [but] . . . To give him rights due to his unlawful presence greater than those he would have had if he had not come to this country, would be the worst sort of bootstrapping and would encourage aliens to enter this country surreptitiously". 523 F.2d at 557. The same reasoning should have been applied by the Second Circuit in this case. Haitians are not entitled to judicial review of denial of admission under the normal refugee program and they should not be allowed to obtain such review as a result of their attempts to enter the country illegally.

The alleged injury to the Haitian respondents also does not satisfy the "traceability" requirement for standing. The injury claimed by the interdicted Haitians is their "return" to a country where they might be persecuted in alleged violation of 8 U.S.C. § 1253(h). Missing, however, is the required "causal link" between the claimed injury and the interdiction program. Repatriation is an integral part of the Haitian interdiction program because the boats used to smuggle the Haitians into the United States are rarely seaworthy. Most interdicted Haitians are "economic migrants" who do not face persecution when repatriated, and the officials who conduct the interdiction and repatriation program cannot distinguish between Haitians who are political refugees and those who are not.[36] Consequently, if the interdiction program results in the repatriation of any bona fide refugee to Haiti, that is only a collateral and unintended effect

[36] Resp. Opp. at 7 n.7.

of the Government's effort to stop an unlawful mass migration of Haitians in the manner that least endangers their lives. The inability of a repatriated Haitian to escape persecution in his country by entering the United States is traceable to his failure to qualify for admission under the U.S. refugee program established by Congress, not to the Government's enforcement of the immigration law's nonrefugee provisions.

In attempting to cope with mass illegal immigration from Haiti, the Government has only limited options. If the Haitians successfully challenge the repatriation option, the Government will be forced to (1) allow mass illegal entry into the United States, (2) turn away the Haitian boats and risk the drowning of their occupants, or (3) provide Haitian interdictees access to the U.S. asylum program, which by law is limited to aliens present in the United States. Aliens intent on breaking U.S. immigration laws should not be allowed the use of federal courts to force such choices upon the Government.

CONCLUSION

This Court should reverse the judgment of the Court of Appeals for the Second Circuit in this case on the ground that the respondents lack standing to challenge the Haitian interdiction program.

Respectfully submitted,

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APPENDIX

HAITI: A STATUS REPORT ON REPATRIATION
June 26, 1992

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Executive Summary

Since the large-scale migration of Haitian boat people began in the aftermath of the September 30 coup in Haiti, the Federation for American Immigration Reform has supported the U.S. policy of interdiction at sea and the processing of asylum claims at Guantanamo, Cuba. However, when the Bush administration instituted a policy of interdiction and direct repatriation of Haitians on May 24, FAIR felt it necessary to observe first hand whether Haitians seeking political asylum in the United States were being given an opportunity to do so. In addition, we attempted to ascertain whether individuals returned to Haiti were becoming the victims of retribution at the hands of the Haitian junta.

During the week of June 15-19, three members of FAIR's senior staff conducted a fact-finding mission to Haiti. The following report is an account of the major findings of the FAIR investigation of conditions in Haiti.

1. Repatriations occur without incident. The FAIR task force observed two boat loads of Haitians being repatriated from Guantanamo. On both days, the processing of the returnees was handled routinely by civilian Haitian immigration authorities. There was a large and visible presence of Haitian and international Red Cross personnel, the U.S. Coast Guard and the U.S. Embassy. After the initial readmission to Haiti, the returnees are placed in the care of the Red Cross which assists the repatriates in getting to their home villages.

2. Guantanamo had become a magnet for economic migrants. Economic conditions in Haiti have deteriorated to a point where even the prospect of making it to the U.S. Naval Base at Guantanamo had become an incentive for migration. Without exception, all those currently being repatriated stated that they left Haiti for economic, not political reasons. With about one-third of those at Guantanamo being allowed to enter the United States, Guantanamo itself had become a magnet for still more to come.

3. "In-country" application for refugee status is possible. As of May 24, the formal U.S. policy is that any Haitian who wishes to apply for refugee status in the United States must do so in Haiti. Haitians have free and easy access to the U.S. Embassy in Port-au-Prince. Comings and goings at the embassy are not routinely monitored by Haitian authorities. Those wishing to file an application for refugee status can do so without interference or retribution from Haitian authorities. Arrangements can also be made for individuals in remote parts of the country who do not have easy access to the embassy itself. In addition, the U.S. Embassy has widely disseminated information on how to apply for refugee status. Pertinent information has been broadcast on all popular Creole language radio stations.

4. Repatriates have not been singled out for persecution. After conducting extensive interviews with dozens of repatriates and human rights monitors in Haiti, there is no evidence that those who have been returned to Haiti have been murdered, harmed or jailed. In some parts of the country, returnees have been harassed or intimidated by local authorities acting on their own. However, such harassment and intimidation by local police or militia of all citizens is widespread in many parts of the country.

5. The embargo is widely violated and is creating additional hardship for Haiti's poor. Many OAS members,

the European Community and the Japanese are refusing to honor the economic embargo. As a result, those who were behind the coup are being inconvenienced by somewhat higher prices for imported goods, while Haiti's poor are being decimated by loss of jobs and higher costs for essential goods. Most forms of humanitarian and agricultural assistance have been reduced or halted as a result of the embargo which also harms Haiti's poorest citizens.

6. Haiti has become an ecological disaster. Virtual total deforestation of Haiti has created an ecological and agricultural disaster. Soil erosion threatens the livelihood of millions of poor Haitians who survive on subsistence farming. The loss of farmland is also contributing to massive urban migration, primarily to Port-au-Prince which lacks even the basic health and sanitation facilities to cope with its current population.

I. Purpose of Visit

Between June 15-19, 1992, three senior staff members of the Federation for American Immigration Reform, Dave Ray, Cameron Whitman and Ira Mehlman, visited Haiti to make an independent assessment of conditions in that country. The objectives of the visit were to determine:

a. general economic and political conditions in Haiti;
b. general human rights conditions;
c. human rights conditions of Haitian boat people who have been repatriated; and
d. the viability of making "in-country" asylum claims.

During our week in Haiti we conducted extensive interviews with human rights organizations, representatives of international and private volunteer organizations, Haitian scholars and intellectuals, high level U.S. Embassy personnel and repatriated Haitians themselves. The objective was to get a broad cross section of opinions about the causes of the Haitian migration problem and how the United States might best cope with it. Our overriding con-

cerns, however, were to determine whether boat people our government has returned to Haiti have been the targets of reprisal by the leaders of the Haitian coup and whether those in fear of political persecution can freely seek political asylum at the U.S. Embassy.

From the time the first wave of boat people began leaving Haiti in late October, FAIR has supported the policy of processing Haitians seeking political asylum in the United States at Guantanamo Naval Base, Cuba, and repatriating those who were not fleeing political persecution. However, when the administration began its new policy on May 24 of interdiction and direct return of boat people, FAIR felt an obligation to conduct its own fact-finding mission to determine whether people with legitimate asylum claims were being given ample opportunity to press those claims.

II. A Political History of Haiti

Haiti has been an independent nation since 1804, when a slave rebellion expelled the French colonists. In the ensuing 188 years, the country has enjoyed seven months of democracy (from February to September 1991). With the exception of the democratic election of Jean Bertrand Aristide in late 1990, every transition of power in Haiti has come at the point of a gun.

Throughout its history, Haiti has been a classic plutocracy in which a tiny elite, backed by a fractionalized and poorly organized military and police force have maintained political and economic control of the island. Most Haitians live in abject poverty, are illiterate and display an animistic fatalism toward life. With the brief exception of the Aristide regime, there has been little political will or organization among the peasants to challenge the plutocratic order.

Aristide was and remains an anathema to the Haitian power elite. His power base is composed of Haitian peasants, some intellectuals and university students. These people make up the vast majority of the Haitian population. The elites, with the support of traditional military factions (numbering about 7,000 men), deposed Aristide to ensure their continued control of Haiti.

The military junta which seized control from Aristide on September 30, 1991, is still in the process of consolidating its power and seeking international recognition as the legitimate government of Haiti. On June 19, 1992, the Haitian legislature installed Marc Bazin as Prime Minister of the country in an attempt to create a civilian front for the military regime. Bazin himself is a long-time political rival of Aristide who was soundly defeated in the 1990 election. According to one election monitor, Aristide captured 67 percent of the vote in Haiti's only democratic election, to just 13 percent for Bazin.

In speaking with representatives of the United States Government, the OAS and other organizations, it is evident that a government controlled by Bazin as Prime Minister and Aristide as a titular president with little actual authority, would be an acceptable arrangement to most of the international community. Clearly, such an arrangement would have the enthusiastic support of Haiti's elite. However, there is overwhelming sentiment among the Haitian masses that the only acceptable resolution would be the unconditional restoration of Aristide to the presidency.

III. The Repatriation Process

Since the coup that ousted Haiti's first democratically-elected President Jean Bertrand Aristide on September 30, the United States Government has processed 37,997 Haitians who have sought political asylum in the United States. Of these, 11,119 have been approved for asylum and 9,007 have already been admitted. 23,420 people have been processed at the U.S. naval base at Guantanamo, Cuba, and been determined not to be political refugees. An additional 704 individuals returned to Haiti voluntarily and 2,887 have

been returned directly to Haiti since the United States instituted a policy of intervention and direct repatriation on May 24, 1992. (A small number of individuals find themselves in a state of limbo on Guantanamo, primarily due to HIV infection.)

The FAIR team had the opportunity to witness two repatriations of about 500 Haitians being returned from Guantanamo on June 17 and 19. Upon arrival at Port-au-Prince, the returnees are first issued new identity cards by Haitian immigration authorities. The people issuing the documents (four, on the days we observed) are in civilian dress. In addition, two armed, uniformed military officers were present in the repatriation area.

The interviews with the Haitian immigration authorities were brief and routine. Each returnee was asked their name, where and when they were born and where they currently resided. The Haitian authorities did not ask the repatriates why they had left. Upon completion of the questioning, each person was issued a new identity document. During our two days of observation we did not witness anyone being finger printed or photographed by the Haitian authorities. However, according to Audrey Dumentat, a Consular Officer with the U.S. Embassy in Port-au-Prince, random finger printing does occasionally occur.[1]

After being processed by the Haitian authorities, the returnees were then turned over to the Red Cross. Each person is given the equivalent of $15 in cash to cover the cost of transportation to their home villages. They are also issued Red Cross ration cards for a 45-day food supplement.[2] The Red Cross then transports each repatriate to

[1] The finger printing is strictly for intimidation and harassment value. The Haitian government does not have the capability to match the finger prints in their files.

[2] The first wave of people repatriated from Guantanamo received this supplementary assistance. However, according to Red Cross field workers, no food has been received since early April and the returnees are unaware of this until they seek assistance. The Haitian Red Cross as well as International Red Cross are aware of this problem, nevertheless, they continue to issue ration cards without informing the recipients of these conditions.

the Port-au-Prince bus depot where each individual is responsible for making their own arrangements for transportation home.

Each repatriation is observed by representatives of the U.S. State Department, USAID, the U.S. Coast Guard, and the International Red Cross. Independent observers, such as ourselves, are given free access to the entire process. We were never impeded by U.S. authorities, Haitian authorities or the by the Red Cross from watching or listening to any part of the process. We were also free to photograph whatever and whenever we wanted. We also had an opportunity to speak with any of the repatriates at any time. None appeared frightened or intimidated to talk with us, despite the presence of uniformed and non-uniformed Haitian officials.

It is clearly evident to any observer that the repatriation process itself does not lead to any subsequent persecution of the returnees. The Haitian authorities present at the Port-au-Prince repatriation site are little more than bureaucrats going through the motions of doing their jobs. According to other reliable international observers, they occasionally engage in random intimidation of returnees, much as they engage in random intimidation of average citizens and even foreigners, but they do not have the organizational capability for systematic retribution.

IV. Opportunities for "In-Country" Application for Asylum

The policy instituted on May 24 requires all Haitians wishing to seek political asylum in the United States to make their application in Haiti, rather than taking to the sea

and making their claims at Guantanamo or aboard Coast Guard cutters. One of the primary purposes of our mission to Haiti was to determine whether in-country applications for political asylum were feasible given the political situation on the island. We attempted to determine whether Haitians were aware that they could request asylum in-country and whether they could do so without putting themselves at risk.

Leslie Alexander, the Deputy Chief of Mission at the U.S. Embassy in Port-au-Prince (and the highest ranking official in the absence of Ambassador Al Adams) informed us that there has been a concerted effort to make Haitians aware of opportunities to request asylum in-country. These efforts have included advertising on popular radio stations in Haiti as well as bulletins on the Creole language service of Voice of America. In addition, embassy personnel have also spread the word as they move about the island.

Haitians wishing to apply for political asylum can do so in a number of ways. The radio ads supply phone numbers for people to call to set up appointments for an asylum hearing. These hearings may be held at the embassy in Port-au-Prince, or at some other designated location. According to Alexander, in certain cases, the embassy will even send teams to an applicant's home village if necessary.

Applications can also be made in person at the embassy. Access to the U.S. Embassy is unimpeded and there are no apparent signs that Haitian authorities are keeping tabs on who enters and leaves the embassy. This conclusion is the result of personal observation, discussion with embassy personnel and conversations with private Haitian citizens. Two Haitian students whom we met on the streets of Port-au-Prince and who served as guides on a walking tour of the city both indicated that they would not be concerned about entering the U.S. Embassy.[3]

[3] Unlike conditions in the old Soviet-bloc, Haitians are not worried about the consequences of speaking frankly and being seen openly with foreigners. There is no indication that they are being observed or that they will later be questioned by Haitian authorities.

In-country application for refugee status is essential to controlling further outflows of migrants from Haiti. Since the ouster of Aristide, the country has been gripped by a sense of despair. In such an atmosphere, even the prospect of making it to Guantanamo had become a magnet drawing additional migrants. With approximately one-third of the migrants at Guantanamo being given permission to go to the United States, these odds have encouraged many desperate Haitians to risk their lives on the treacherous seas.

V. Condition of Repatriated Haitians

During our week in Haiti, we had the opportunity to conduct extensive interviews with about a dozen people who had been on Guantanamo and were returned home. These interviews were conducted either directly with repatriates who spoke English or French, or through interpreters (that we hired) for those who spoke only Creole. In addition to speaking to the returnees, we also spoke with representatives of human rights organizations such as the International Red Cross, Americas Watch and Catholic Relief Services.

In our interviews with the repatriated Haitians we attempted to learn the following:

a. Why they left Haiti in the first place;
b. The substance of the claims they made to U.S. officials on Guantanamo; and
c. Whether they had been singled out for persecution or retribution after returning to Haiti.

The reason why there has been an attempted mass exodus from Haiti is self-evident: The vast majority of people in

that country live in abject poverty. Without exception, every person we spoke with told us that their motivation for attempting to migrate to the United States was economic, not political.

There is an atmosphere of despair in the country that has intensified since the ouster of President Aristide who provided millions of impoverished Haitians with some modest hope for a better future. Without exception, every returnee we spoke with told us that they wanted to come to the United States to seek economic opportunity. This feeling of despair was also conveyed to us by better educated Haitians who have not attempted to leave Haiti.

The story of Camille (an alias) is typical of the people we spoke with. We found Camille with the assistance of Guy Dejean, the Red Cross representative in the coastal town of Gonaives where approximately 200 people have been returned. Camille attempted to migrate to the United States in November, was picked up by the U.S. Coast Guard, held on Guantanamo and returned to Haiti in February. A woman in her mid-twenties, Camille was the mother of five children (a sixth was born on Guantanamo) whose husband is ill and cannot find steady work. She hoped to make it to Florida and find a job as a house cleaner and send money back to support her family. When asked if this is what she told immigration officers at Guantanamo, Camille indicated that it was.

Similar stories were told to us by other returnees in Gonaives as well as by the people we spoke to at the repatriation center in Port-au-Prince. No one we spoke with told us that they had left Haiti for fear of political persecution.[4] None of the returnees we spoke with were fearful that they would become targets of retribution for having left.

[4] Only one individual refused to tell us his reasons for leaving Haiti. A 16-year-old boy claimed to have left for reasons other than economic, but declined to specify what those reasons were. He simply asserted that his sister, who is several years older, was admitted to the U.S., but that he was denied admission because he is a minor.

Our second objective was to determine whether people who have been repatriated have been persecuted by the government since returning. What we discovered is that there is no retribution directed from the leaders of the military government in Port-au-Prince, but that returnees are often harassed and intimidated by local police and militia in the provinces.

The disorganization of the central government would preclude any sort of systematic campaign of retribution, even if they were inclined to carry one out. In Haiti, each military commander and police chief is pretty much free to act on his own. This often means harassment and intimidation of repatriated boat people and others. Camille and others in Gonaives claim (convincingly) that verbal threats have been made against them by local militia, but none has been carried out.

Guy Dejean, who deals with all the returnees in Gonaives, was not aware of a single individual who has been jailed or murdered after repatriation. Arlen Hunsberger, the temporary representative of the Organization of American States in Haiti stated, "I can't imagine the Haitian government would be that organized." Finally, the U.S. Embassy in Port-au-Prince has sent teams of investigators around the country to follow up on the conditions of people who have been returned. To date, they have contacted 3,200 repatriates and have not found a single individual who has been jailed, harmed or murdered since returning.

Repression by military and police officials is a fact of life in Haiti. While there is no reason to disbelieve the claims of returnees that they are harassed by local military and police, it is also true that many others (including us), who

did not attempt to emigrate, are also subjected to harassment.

VI. The Effects of the OAS Embargo

The embargo which was put in place shortly after the September 30 coup has not caused any acute hardship for those who were behind the overthrow of Aristide. All imported goods are readily available, although they have become more expensive. The fancy restaurants are packed with affluent Haitians, the supermarkets are stocked with fresh produce, while poor Haitians go hungry and drink untreated water. The streets are jammed with BMWs and Range Rovers, while the rest of the population moves about in dangerously overcrowded vans, pick-ups and buses.

The most damaging effect of the embargo has been the drastic reduction in humanitarian aid. Food and medical assistance continue, though to a reduced degree. Other urgently needed humanitarian programs, however, have been halted, most notably agricultural assistance and reforestation programs. Thus, those programs intended to help Haitian peasants develop and maintain a subsistence existence have been ended, while the rich have been merely inconvenienced.

There is widespread agreement in Haiti that continuation of the embargo is necessary because it denies legitimacy to the military government. But there is also a pervasive belief that the embargo must be tightened to punish those who have benefitted from the coup, while programs that are essential to the Haitian masses be restored. The conditions of the OAS-sponsored embargo are routinely violated by many OAS member nations themselves, while the European Economic Community and the Japanese have refused to honor it at all.

Unless the embargo is tightened and essential humanitarian aid restored, the political benefits of withholding legitimacy from the military regime will be far outweighed

by the additional suffering it is causing to the vast majority of the Haitian people.

VII. Environmental Degradation

Since Haiti has few natural resources besides its land, people and surrounding seas, the question of agricultural productivity and a sound environmental policy are key to the country's future development and welfare.

The island has completely lost its natural, closed canopy forests, save two small plots of land on the tops of mountains in the south of the country. The deforestation has occurred mostly in the last 20 years. But the loss of the trees was not the only tragedy. The topsoil, which is exposed to intense sunshine nearly every day of the year, has severely eroded and washed out to sea. In the south of the country, where rainfall is more abundant, massive landslides have become commonplace.

The nearby seas are not in much better condition. Overfished and damaged by the silt from the island's run-off, the once productive coral reefs have been severely damaged and their recovery is in doubt.

The mountainous nature of the country coupled with its spotty rainfall has made agriculture, Haiti's biggest employer, a tough occupation indeed. Water projects have been devised for the rice producing areas north of Port-au-Prince, but most of the country relies on natural rainfall or groundwater irrigation. The northwestern part of the country, which receives the least amount of rainfall, has been largely desertified, with several forms of cacti and sagebrush dominating the landscape.

While this vegetation is natural on southern-facing mountain slopes in the tropics, the extent and location of the desertification is certainly due to the wholesale and rapid removal of the naturally occurring forests, which shaded the ground and retarded water loss. Once the canopy was

removed, the micro-climate was drastically altered by the rapid loss of ground moisture, and desertification began.

Cactus grows so well on the hard-baked soil of some regions of the country that it is used as natural fencing for livestock. Livestock is mostly goats, with some small scale cattle production.

Food crops are grown mostly in the south and in the mountains outside Port-au-Prince, away from the coast and the heavily populated areas. Rainfall here is more abundant and has allowed the development of low-lying, natural ground cover. Because of the mountainous nature of the country, temperate climate crops including potatoes and cabbage can be grown in the higher elevations while tropical crops such as mango, melons, rice and bananas can be grown in the lower elevations.

Officials at USAID report success with getting local farmers to plant trees in an effort to save the remaining topsoil and provide natural cooling for their dwellings. In fact, several million trees have been planted in the last decade, but their demise is all too evident after a quick stroll through the marketplace in Port-au-Prince. Most trees are cut down before they reach three inches in diameter and made into charcoal, the country's chief source of fuel for cooking.

With intensive international investment and domestic cooperation and participation, Haiti could regain much of its lost agricultural potential. Many of its mountains could eventually be reforested or terraced, allowing intensive food production and major reductions in soil loss. Unfortunately, this type of monumental, international effort is usually prefaced on internal political stability which is the cornerstone of any developmental project. Political stability is surely the premier task facing the nation.

VIII. The Politics and Economics Behind the Boatlifts

Boatlifts do not happen spontaneously. Masses of people do not suddenly hop in small boats and attempt to sail 600 miles across treacherous seas. Large scale movements of people of the type we have witnessed since the coup in Haiti are organized events which take advantage of people's desires to emigrate. Boatlifts are organized by people who have a political or an economic stake in them. This has certainly been true in Haiti.

Haiti, by the admission of most Haitians, is an unimportant country. What happens in Haiti is unlikely to attract more than fleeting attention from most of the rest of the world. A military coup in Haiti, in itself, would ordinarily soon be forgotten by the outside world preoccupied with other crises in other areas of the globe. According to most knowledgeable observers of Haitian politics, this is precisely what the leaders of the coup were counting on. Were it not for the boat people, the Haitian coup would almost certainly have faded from international consciousness within a matter of weeks, if not days.

From the standpoint of the perpetrators of the coup, the one thing that could challenge their usurpation of power would be some form of military intervention from the outside, namely the United States. And the only thing that might inspire American military intervention (particularly in the post-Cold War era) would be a large-scale refugee problem that the United States would be forced to deal with. Thus, the leaders of the coup would have an incentive to limit the kind of activities that might cause large numbers of people to attempt to flee the country. A centrally directed reign of terror, though certainly not something the Haitian military would shy away from, is clearly not in their interest at this time. Rather, it is likely that the junta would direct their attention toward the Aristide inner circle, not terrorizing the general population.

Politically, those with the most to gain from mass emigration, are those with an interest in seeing the Haitian situation remain a focus of world attention, namely the supporters of Aristide. Without coming right out and saying it, many of the political observers we spoke with in Haiti implied that some of the more recent waves of boat people have been encouraged by Aristide supporters. If that is true, then the Aristide supporters have succeeded splendidly in achieving their objectives.

The boatlifts have also been an economic boon to a handful of enterprising entrepreneurs in Haiti. There seems little doubt that the emigration was quickly turned into a profitable commercial enterprise by the small, wealthy, elite that controls most of the commerce on the island. A boat building industry was financed and sprung up almost overnight, while agents went into villages all around the country spreading rumors that the United States was prepared to admit asylum-seekers and encouraging people to buy a passage to the promised land. Several of the returnees we spoke with said they had been led to believe by those operating the boatlift that there was a window of opportunity for admission to the United States. Sadly, nearly all the people we spoke with liquidated their meager assets and borrowed from family and friends to pay their passage to America.

IX. Recommendations

At a United Nations conference on international migration, May 6-8, 1992, in Geneva, Switzerland, Sadaka Ogata, the U.N. High Commissioner for Refugees issued a dire warning that has ramifications with respect to the current situation in Haiti. Mrs. Ogata stated:

> Under circumstances where most regular migration channels to the industrialized world have been closed, refugee status has been increasingly perceived as a way of circumventing immigration restrictions. As a result, the distinction between

> refugees and migrants has become increasingly blurred both in the public mind and on the political agenda. The institution of asylum has come under serious pressure and may be gravely undermined.

Haiti is a perfect example of the kind of blurring the High Commissioner foresees developing in many parts of the world. There is a symbiotic relationship between the poverty, political instability and political repression one finds in Haiti. People are poor because there is no political stability on the island, while the instability itself becomes a cause for still greater repression which further exacerbates the poverty. Haiti is not unique in this respect; it is merely one of the most advanced cases of the political and economic dysfunction that afflicts much of the Third World.

1. The United States should continue to interdict and return Haitian boats headed for Florida. A program of in-country screening of people requesting political asylum is feasible and can be carried out fairly without endangering those who apply and are denied. The experience gained over the past six months of bringing boat people first to Guantanamo indicates that such procedures have become magnets for additional mass exoduses. U.S. policy should be designed to ensure that those who are politically persecuted have an opportunity to make a claim for asylum, but should not encourage those fleeing poverty to seek asylum. Some of the resources that had been committed to maintaining detention facilities on Guantanamo should be redirected toward stepped-up refugee screening capabilities within Haiti.

2. Strengthen the economic embargo, while increasing humanitarian aid. The United States should actively encourage its OAS partners, members of the European Economic Community and the Japanese to honor the economic embargo against the illegitimate government now in power in Port-au-Prince. The embargo is being widely violated at

present, with the result being increased depravation for Haiti's poor and only mild inconvenience for those who instigated the coup. In addition, humanitarian and agricultural assistance which has been curtailed since the imposition of the embargo should be restored. In particular, USAID programs which have been frozen and the Peace Corps, which has been withdrawn entirely, should resume full activities directed at improving conditions for the Haitian masses. Attention and priority should be given to reforestation efforts, which is a necessary first step to renewing Haiti's agricultural capability.

3. **Family planning and literacy programs.** The powerlessness of the Haitian masses stems from its exploding population and near universal illiteracy. The objective of any foreign aid program should be to promote self-sufficiency of the population. Nothing would do more to further that objective in Haiti than family planning and basic literacy for Haitians.

4. Stepped-up human rights monitoring in Haiti. Given its current resources, the American Embassy in Port-au-Prince is doing all it possibly can to determine whether those who have been returned to Haiti are being singled out for persecution. To date, they have investigated the condition of some 3,200 repatriates. This will need to be an ongoing process and a continued priority of our government. The fact that there is currently no systematic campaign of retribution against returned boat people is no guarantee that there won't be one if the military junta believes there is no one watching. Effective monitoring of human rights in Haiti is an arduous and time-consuming task. Poor roads, poor or nonexistent telephone service in many parts of the country, and the lack of permanent addresses for much of the population, make a difficult job all the more difficult. There is no substitute for sending teams of investigators into the field so long as the current government remains in power.

Methodology

Three members of FAIR's senior program staff traveled to Haiti on June 15, and returned on June 19. The primary reasons for the trip were to investigate how the repatriated Haitians have been treated by the Haitian authorities and to determine how the in-country processing of asylum claims was working. The FAIR task force also wanted to look at the Haitian political situation, to determine the effects of the embargo and to evaluate the impact of the current crisis on the nutrition and health needs of the Haitian poor. Due to extensive deforestation and loss of topsoil throughout Haiti, the task force sought information on agricultural and environmental conditions and programs in Haiti; *particularly* whether conditions have deteriorated and programs have been curtailed due to the embargo and the narrow limits the OAS has placed on humanitarian aid.

To make full use of the task force's time in Haiti, the following contacts were made and meetings scheduled from Washington or on arrival in Port-au-Prince:

Douglas Hartley—a resident of D.C. and a former Foreign Service officer who worked recently under contract in the U.S. Embassy in Port-au-Prince. Douglas briefed a member of the FAIR staff on the conditions he found in Haiti and provided names of several of his key Haitian contacts who could provide information on the political situation and on the Haitian boat people.

Guy Mallary—a private Haitian lawyer and intellectual from a politically active family. He worked for Marc Bazin in the past and was jailed briefly due to his association with the new Prime Minister. Mallary outlined the repeating patterns in Haiti's political history, offered his analysis of the current crisis both from the side of the coup supporters/power elite and the Aristide supporters (primarily poor peasants), suggested possible solutions for

the current crisis and commented on repatriation, deforestation, etc.

Leslie Alexander—Deputy Chief of Mission, U.S. Embassy, Port-au-Prince. Mr. Alexander is the senior U.S. Embassy officer responsible for coordinating the administration's Haitian policies. He works with the State Department and local embassy staff to carry out the follow-up visits with repatriates to determine if any persecution has occurred; to set up consular/INS teams to travel in the countryside to conduct asylum interviews; and to establish a system for asylum interviews and processing asylum claims at the U.S. Consulate in Port-au-Prince. Mr. Alexander has also overseen the embassy's monitoring of the repatriations and its radio campaign to inform Haitians that they may make asylum claims at the U.S. Consulate. Also, Mr. Alexander has met with human rights monitors.

Audrey Dumentat—U.S. Vice Consul (and several other consular officials). Audrey and her colleagues monitor the repatriation process at the Port-au-Prince dock and are available for repatriates to approach with asylum requests.

Larry Harms—U.S. Agency for International Development (USAID) officer. He works with USAID agricultural and environmental programs and is qualified to report on past and current USAID activities in Haiti.

Amnesty International—An effort was made to contact an Amnesty International representative in Haiti. The organization does not have any personnel on assignment in Haiti but does send someone in occasionally. There was no representative there during our visit.

Larry Mizell—Coast Guard officer stationed in Port-au-Prince. He provided very general information about the Coast Guard mission in Haiti.

Arlen Hunsberger—temporary OAS representative in Haiti. He knows Haiti well due to a four year assignment there in the past. Arlen is knowledgeable about the embargo,

and its effects and the agricultural and environmental programs funded in the past with international aid.

Edward Chaivan—Director, Catholic Relief Services in Haiti (CARITAS). CARITAS programs are mainly in southern Haiti but Mr. Chaivan did give us the name and phone number of the CARITAS director in Gonaives, Father Gerard Dormville. We were unable to reach Father Gerard by phone.

Madame Virginia Ubik—Director, CARE, was contacted to get detailed information on conditions for repatriates and Haitian peasants in general. She was out of the country and the staff was not prepared to talk with the FAIR delegation.

International Red Cross—-Barbara Brook—Canadian citizen and a member of the Red Cross staff in Port-au-Prince. Barbara monitors the repatriation process and is knowledgeable about Haitian Red Cross programs throughout Haiti, particularly the supplemental food programs for repatriated Haitians. She talked with the FAIR task force and put us in touch with Guy DeJean, Regional Director of the Haitian Red Cross in Gonaives.

Haitian Red Cross—-Guy Dejean, Regional Director of the Haitian Red Cross in Gonaives, is responsible for distribution of food in his region to more than 200 repatriates. Guy is in touch regularly with the repatriated Haitians in his region and can report first-hand on how they were treated before and after their return.

Christian missionaries stationed in northwest Haiti—They were temporarily in Port-au-Prince and talked with the FAIR task force about the political, health and nutritional conditions in the northwest of the country. They have a feeding center for fifty Haitian children.

Chantal Joachim—Interpreter and romance language teacher at the University in Port-au-Prince. She is employed only part-time due to the embargo. She reported

on the problems university students and Haitian middle-class intellectuals are having with the government.

Gilbert Geroute—Interpreter and well educated intellectual. He is unemployed due to the embargo. He was very knowledgeable about the political scene and the behavioral patterns of both military and civilian supporters of the current and past Haitian governments.

Bernard Hilder—German radio correspondent.

The FAIR task force also spoke with the following:

Repatriates going through the repatriation process at the docks in Port-au-Prince—We asked them why they left Haiti and what their attitudes, fears and concerns were on their return.

Repatriates in the Region of Gonaives—We asked them why they left Haiti and how they had been treated by the authorities before their departure and since their return.

Haitian students—Three acted as informal guides for us in Port-au-Prince. We needed their assistance to walk around the city and we also wanted to see if they feared any retribution for publicly meeting with a group of foreigners seeking information.

Service personnel—informal interviews with a wide range of Haitians whom we came in contact with on a daily basis, including bartenders, hotel desk clerks, restaurant waiters, taxi drivers, etc.—We spoke with dozens of people in the service sector to learn of their political attitudes and knowledge of any type of persecution.

Cameron D. Whitman

Cameron Whitman is the field director for FAIR. She has extensive international experience living and working abroad. Cameron has served as a Peace Corps volunteer

working with the Quechua-speaking Indians to develop literacy and community development programs. She has also lived and worked in Yugoslavia and Italy with the U.S. Government and for private voluntary organizations (PVO's) and as a free lance consultant. Cameron has a B.A. in political science.

David Ray

Dave Ray has a Bachelor of Science degree in Agriculture and has worked as an agricultural economist for the Foreign Agriculture Service in Washington, D.C. He has lived and worked on several farms overseas and has a keen interest in horticulture. He was raised on a small farm in Ohio.

Ira Mehlman

Ira Mehlman has extensive experience as a journalist and has lived and worked in the Middle East. He has also served on the staff of an important congressional committee and as a Special Assistant to the Governor of Colorado. Ira holds a Bachelor's degree in Political Science and a Master's degree in Communications.